Supreme Court, U.S.
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No.___

IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *et al.*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Indian Gaming Regulatory Act, instead of the Pueblo's Restoration Act, govern gaming activities on the reservation lands of the Ysleta del Sur Pueblo?

2. If not, should the gaming provisions of the Pueblo's Restoration Act be interpreted consistently with this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) thus preventing a grave miscarriage of justice?

LIST OF PARTIES

State of Texas

John Cornyn,
Attorney General

Ysleta del Sur Pueblo,
a federally recognized Indian tribe, 25 U.S.C. § 1300g *et seq.*

Tigua Gaming Agency,
a regulatory agency of the Pueblo

Tribal Council,
the governing body of the Pueblo, 25 U.S.C. § 1300g-3(b)

Albert Alvidrez,
Tribal Governor

Carlos Hisa,
Lieutenant Governor

Francisco Hernandez,
Gaming Commissioner

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PETITION FOR A WRIT OF CERTIORARI

Come now Ysleta del Sur Pueblo, the Tigua Gaming Agency, the Tribal Council, Albert Alvidrez, Carlos Hisa, and Francisco Hernandez seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on 17 January 2002, Appendix at 1a. The motions for rehearing and rehearing en banc were denied on 13 February 2002, Appendix at 3a. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

OPINIONS AND ORDERS BELOW

Petitioners appealed seven Orders of the United States District Court for the Western District of Texas: (1) the 2 December 1999 Order Regarding Defendants' Motion to Dismiss except those matters relating to tribal sovereignty, Appendix at 5a; (2) the 17 December 1999 Order that Defendants File their Answer except for those matters relating to tribal sovereignty; (3) 13 January 2000 Order Denying Defendants' Second Motion to Dismiss except for those matters relating to tribal sovereign immunity, Appendix at 17a; (4) the 27 September 2001 Order Granting Summary Judgment and Injunction, Appendix at 25a; (5) the 27 September 2001 Order Denying Defendants' Motion for Summary Judgment, Appendix at 30a; (6) the 2 November 2001Order Denying Defendants Motion for New Trial and Motion to Amend Judgment; and (7) the 6 November 2001 Order re: Attorney's Fees and Costs. The 2 December Order and supporting Opinion are reported at 79 F. Supp. 2d 708 (W.D. Tex. 1999). None of the others are reported, and neither is the opinion of the Fifth Circuit affirming the district court's rulings, Appendix at 2a.

STATUTORY PROVISIONS

The primary statutory provision at issue is set out below.

25 U.S.C. § 1300g-6 Gaming activities

(a) In general

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accord-

ance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Other pertinent statutory provisions are set out a pages 81a-89a of the Appendix.

STATEMENT OF THE CASE

Overview

This case asks whether the federal courts can deny the rights and privileges accorded Indian tribes by an express act of Congress. Petitioners are the Ysleta del Sur Pueblo ("Pueblo"), its agencies, and its tribal officials. The Pueblo is a small, impoverished, federally recognized Indian tribe in west Texas which has been fighting to continue its culture and existence. Since 1993, it has maintained and operated the Speaking Rock Casino and Entertainment Center ("Speaking Rock" or "Casino") on tribal lands in El Paso, Texas in an attempt to better the lives of its members.

Initially, the Pueblo sought to operate the Casino in accordance with the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 ("IGRA"). However, in a prior case the Fifth Circuit held that the gaming activities of the Pueblo are not subject to this comprehensive scheme, but rather to an earlier 1987 act that restored the Pueblo's federal trust status, 25 U.S.C. §§ 1300g *et seq.* (the "Restoration Act"). *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), cert. denied, 514 U.S. 1016 (1995).

The courts below in this case have further interpreted the Restoration Act—in contrast to the principles of IGRA—as prohibiting the Pueblo from engaging in any gaming activity that would not be permissible for an ordinary citizen of Texas. By their action, the full panoply of state regulation with respect to gaming would now apply to activities on the Pueblo's reservation. On this basis, the district court entered a permanent injunction requiring the closure of the casino, *Texas v. Ysleta del Sur Pueblo*, No. EP-CA0320-GTE (W.D. Tex. Sept. 27, 2001) ("Memorandum Opinion"), Appendix at 31a, and the Fifth Circuit affirmed in an unpublished, one-sentence opinion. *Texas v. Ysleta del Sur Pueblo*, No. 01-51129 (5th Cir. Jan. 17, 2002) ("*Ysleta II*"), Appendix at 2a.

The 1994 decision in *Ysleta I* is fundamentally flawed and should be corrected because its application by the courts in *Ysleta II* inflict a grave miscarriage of justice on this tribe in contravention of federal trust responsibilities.

Petitioners

Petitioner Ysleta del Sur Pueblo is a federally recognized Indian tribe whose reservation is in El Paso County, Texas. See 25 U.S.C. §§ 1300 *et seq.* Petitioner Tribal Council is the governing body of the Pueblo. 25 U.S.C. § 1300g-3(b). Petitioner Albert Alvidrez is the Tribal Governor and a member of the Tribal Council and is sued as such. Petitioner

Carlos Hisa is the Tribal Lieutenant Governor and a member of the Tribal Council and is sued as such. Petitioner Tigua Gaming Agency is a tribal agency charged with regulating the Pueblo's gaming activities. Petitioner Francisco Hernandez is the Pueblo's Gaming Commissioner, i.e. head of the Tigua Gaming Agency, and is sued as such.

The Recognition Act of 1968

The Tigua Indians who comprise the Ysleta del Sur Pueblo trace their roots in the El Paso area back more than three centuries. The Pueblo became a federally recognized Indian tribe in 1968, when Congress passed the Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968). In that legislation, Congress simultaneously transferred responsibility for the Tiguas to the State of Texas: "[T]he Indians now living in El Paso County, Texas, who are descendants of the Tiwa Indians of the Ysleta (Isleta) del Sur Pueblo settling in Texas at Ysleta in 1682, shall, from and after the ratification of this Act, be known and designated as Tiwa Indians of Ysleta, Texas[.]" Section 2 of the Recognition Act provided that "[r]esponsibility, if any, for the Tiwa Indians of Ysleta del Sur is . . . transferred to the State of Texas." The State of Texas had previously passed legislation agreeing to accept "a transfer of the trust responsibilities of the United States respecting the Tigua Indian Tribe." Act of May 23, 1967, 60th Leg., Reg. Sess., ch. 277, 1967 Gen. Laws. 666.

The purpose of the Act was "to overcome the lack of authorization in the State constitution to treat Indians differently than other citizens[.]" See S. Rep. No. 90-1070, 90th Cong., 2d Sess. at 1 (1968). Congressman Richard White from El Paso, sponsor of the legislation, identified the circumstances which made the legislation necessary:

> The city of El Paso has grown up around them and is threatening to swamp their holdings. . . .

> [T]he Tiwa Indians have suffered extreme conditions of poverty and hardships. Many of the Tiwa Indian children are uneducated and in most instances lack the normal bare necessities of life such as shoes and clothing. . . . .
>
> The average annual income of these people is $400 per year. . . . They are now faced with the problem of paying between $80 and $100 per year city taxes on their small adobe shacks. It is impossible for them to pay these high taxes and as a result every Tiwa home is in tax foreclosure.

113 Cong. Rec. H 23,305 (1968).

The Restoration Act

Despite its acceptance of the transfer of trust responsibilities, Texas undertook actions in the early 1980's which threatened the continued existence of the Pueblo as well as that of the Alabama and Coushatta Indian Tribes of Texas which were in a similar position as the Pueblo. In 1983 the Attorney General of Texas opined that the acceptance of the trust responsibilities by the State was unconstitutional and the trust was dry, that under Texas law the Indian tribes were but private associations, and that all the laws of the State applied on their reservations. *See* Op. Tex. Atty. Gen. No. JM-17 (1983). Armed with the Attorney General's opinion, the State undertook actions adverse to the well-being of the tribes. *See* pertinent portions of the written statement of Raymond D. Apodaca, Executive Director of the Texas Indian Commission, as recorded in Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344, before the Select Committee on Indian Affairs, 99th Cong. 2d Sess. 60-64 (1986), Appendix at 90a.

The two tribes beseeched Congress to protect them from the actions of the State. On August 18, 1987, the United States Congress restored the Federal trust relationship between the United States and the Pueblo and the Alabama and Coushatta Indian Tribes of Texas . See Pub. L. No. 100-89, 101 Stat. 666 (1987) (codified at 25 U.S.C. §§ 1300 *et. seq.* with respect to the Pueblo, and 25 U.S.C. §§ 731 *et seq.* for the Alabama and Coushatta Indian Tribes). The new designation of the Pueblo is the Ysleta del Sur Pueblo. 25 U.S.C. § 1300g-1. Although the Act granted the State of Texas Public Law 280 type jurisdiction over the Pueblo's reservation, 25 U.S.C. § 1300g-4(f), it also contained specific provisions limiting the extent of that jurisdiction over gaming activities by the Pueblo. See 25 U.S.C. § 1300g-6.

IGRA

In 1988, Congress created a nationwide, federal regulatory system governing gaming on Indian land, known as the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166 *et seq.* IGRA divides gaming into three classes. Class III gaming is gaming that is neither social or traditional Class I gaming, nor within the various bingo, pull tab, and card games which are authorized as Class II gaming under the statute. *See* 25 U.S.C. § 2703(6)-(8). Class III gaming on Indian land is lawful if authorized by a tribe located in a state which "permits such gaming for any purpose by any person, organization or entity," and if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe." 25 U.S.C. § 2710(d)(1).

IGRA "is a comprehensive and pervasive piece of legislation that in many respects preempts other federal laws that might apply to gaming." *Sisseton-Wahpeton Sioux Tribe v. United States*, 718 F. Supp. 755, 758 (D.S.D. 1989), rev'd on other grounds, 897 F.2d 358 (8th Cir. 1990). Congress

enacted IGRA as the national policy on Indian gaming because existing federal law "[did] not provide clear standards or regulations for the conduct of gaming on Indian lands. . . ." 25 U.S.C. § 2701(3). Congress specifically recognized that gaming was an important "means of generating tribal governmental revenue," and that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government. . . ." 25 U.S.C. § 2701(1) & (4). Moreover, Congress left to the federal government responsibility for the enforcement of IGRA and established the National Indian Gaming Commission for that purpose. 25 U.S.C. §§ 2705 & 2706. Congress intended IGRA "'to expressly preempt the field in the governance of gaming activities on Indian lands.'" *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1248 n. 16 (11th Cir. 1999) (quoting S. Rep. No. 100-446 at 6, reprinted in 1988 U.S.C.C.A.N. at 3076). IGRA, by its terms, governs all tribes that have jurisdiction over their reservation lands. 25 U.S.C. § 2702.

Ysleta I

The Attorney General of Texas, in responding to a query whether enactment of legislation permitting class III gaming within Texas waters would permit such gaming on Indian lands located in the State, specifically opined that under the "last in time" rule of statutory construction, the provisions of the IGRA would prevail over the earlier enacted Restoration Act. See Op. Tex. Att'y Gen. No. DM-32 (1991). Given the Attorney General's opinion, the Pueblo attempted to engage the governor of Texas in negotiations for a Tribal-State Compact for more than a year. In 1993 the Pueblo sued the State of Texas and, in the alternative, its governor seeking a declaration that the State had failed to negotiate in good faith for a compact, and an order granting the Pueblo the specific remedies provided by IGRA. 25 U.S.C. § 2710(d)(7). The State and its governor moved to dismiss

the Pueblo's complaint, claiming that the Tenth and Eleventh Amendments barred suit. The district court denied the motion.

In cross-motions for summary judgment, the parties raised the issue of whether IGRA or the Restoration Act determined the scope of permissible gaming activities on the Pueblo's reservation. The Pueblo argued that section 2710(d)(1) of IGRA determined the scope of gaming activities subject to a Tribal-State compact. The State accepted that regulatory provisions of IGRA were applicable but argued, despite the Attorney General's prior opinion, that section 1300g-6(a) of the Restoration Act controlled the scope of gaming determination. *Ysleta I* at 1331. The Pueblo countered that under either section the result was the same, both being premised on *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Ysleta I* at 1332. Neither party argued that the Restoration Act, instead of IGRA, governed gaming on the Pueblo's reservation.

The district court granted the Pueblo's motion for summary judgment holding the requested gaming activities of baccarat, blackjack, "craps" (dice), roulette, and slot machines were permitted under Texas law and thus were a proper subjects for the tribal-state negotiations contemplated by IGRA. *Ysleta del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993). The State and its governor appealed. The parties presented the same arguments on appeal.

In reversing the district court, the Fifth Circuit relied on new and independent arguments not asserted by any of the parties. In Part III of its opinion, the panel examined (A) the application of *Cabazon Band* to the gaming provisions of the Restoration Act, (B) the conflict between the Restoration Act and IGRA and the controlling force of the Restoration Act, and (C) the Restoration Act's failure to abrogate the Eleventh Amendment immunity of the State.

Although the court wrote in Part III(A) of its opinion that Congress did not enact the Restoration Act with an eye towards *Cabazon*, *Ysleta I* at 1333-34, it left open the question whether IGRA incorporates *Cabazon* with regard to Class III gaming. *Ysleta I* at 1337 n. 17. The only conflict found between the two statutes is set out in Part III(B) of its opinion, where the court concluded that Restoration Act and IGRA have different enforcement regimes because the Restoration Act allows the State to pursue a remedy for injunction. *Ysleta I* at 1334.

Finding that the Restoration Act is a specific statute while IGRA is a general one, the court held in Part III(B) of its opinion that the Restoration Act governs the determination whether the Pueblo's gaming activities are allowed under Texas law. *Ysleta I* at 1335. In Part III(C) of its opinion, the panel held that the Restoration Act did not abrogate the State's Eleventh Amendment immunity. *Ysleta I* at 1335-36. The panel instructed the district court to dismiss the Pueblo's suit for lack of jurisdiction. *Ysleta I* at 1336. The Fifth Circuit decided an issue that was never pled, briefed, or argued: that the Restoration Act, and not IGRA, governs gaming on the Pueblo's reservation. The Fifth Circuit effectively denied the Pueblo its day in court

Pueblo's Gaming Activities

Prior to the Fifth Circuit's ruling, the Pueblo, in good faith and with full knowledge of the State of Texas, commenced Class II gaming activities on its lands under the auspices of the National Indian Gaming Commission ("NIGC"), the federal regulatory body created by IGRA. Texas was aware of and did not object to the NIGC's oversight of the Tribe's Class II gaming activities. The State participated in activities necessary for the NIGC to approve the Class II management agreement. The State also offered to negotiate a compact pursuant to IGRA for Class III lottery and pari-mutuel racing.

At the time of the Pueblo's suit in 1993, a majority of the families of the 1300-member Pueblo were impoverished. A March 1993 income analysis of tribal members indicated that 68% of the heads of households had less than $15,000 in annual income, with and additional 16% earning less than $5,000 annually. See the affidavit of Miguel Pedraza, set out at pages 92a of the Appendix, which was filed with the Fifth Circuit in the *Ysleta I* appeal in support of the Pueblo's Motion for Expedited Appeals Procedures. The Pueblo looked to gaming revenue to improve the lives of its members and has continued its gaming activities believing such are not "prohibited under the laws of the State of Texas." *See* 25 U.S.C. § 1300g-6(a). Not only has the Pueblo and its members experienced significant economic and social improvement due to the Pueblo's gaming activities, but so has the surrounding community of El Paso, Texas, and particularly its minority population. See Executive Summary of "An Evaluation of the Economic Impact of Speaking Rock Casino" by Everett G. Dillman (November 1999).[1] Appendix at 95a.

Ysleta II - the Present Action

The Attorney General of Texas filed an Original Complaint for Injunctive Relief on September 27, 1999, bringing a federal cause of action pursuant 25 U.S.C. § 1300g-6 to enjoin Pueblo-sponsored gaming activities on its reservation. Jurisdiction in the district court was asserted under 25 U.S.C. § 1300g-6(c) and under 28 U.S.C. § 1331.

Defendants (the Petitioners here) filed their Motion to Dismiss based upon their tribal-sovereign immunity, and because the Attorney General lacks authority to prosecute the action on behalf of the State. The district court denied the

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[1] The entirety of the Dillman report was attached to the Pueblo's Motion for Summary Judgment.

motion to dismiss on the basis of sovereign immunity (the "December Order"), Appendix at 5a, but also ordered the Attorney General to replead and specify his authority to prosecute this action. In footnote 13 of its December Order, the district court suggested that the Attorney General use the Texas Common Nuisance Statute as his authority to bring suit.

On December 16, 1999, the Attorney General filed his First Amended Complaint. The next day the district court ordered Defendants to file their answer. They first filed a Supplemental Rule 12(b) Motion to Dismiss, contending that the Attorney General did not simply specify his authority in the new pleading, but that he also brought a new state law claim by requesting that Defendants be enjoined pursuant to the Texas Nuisance Statutes, Tex. Civ. Prac. & Rem. Code Ann. §§ 125.001 *et seq.* (Vernon 1997, Pamp. 2001). Defendants argued that whatever abrogation of immunity might be contained in Section 1300g-6, it did not extend to the state law claim, and that Section 1300g-6(b) specifically prohibited the assimilation of such laws.

The district court denied the Supplemental Motion to Dismiss on January 13, 2000 (the "January Order"). Appendix at 17a. The court held all state gambling laws, which include the nuisance statute, become federal law for purposes of reservation gambling, and thus Chapter 125 constituted sufficient authority for the Attorney General to seek injunctive relief under the Restoration Act. The court justified the complete assimilation of Texas law in footnote 5 of its opinion:

> Section 1300g-6(b) appears to have been derived from two United States Supreme Court opinions. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976). Although the Supreme Court in those cases determined that Public Law 280 (18 U.S.C.

> § 1162) did not grant to certain states general civil regulatory authority over tribal reservations, it also held that such authority could be granted where expressly provided by Congress. *See Cabazon*, 480 U.S. at 214-15; *Bryan*, 426 U.S. at 383-85. These cases reinforce the notion that Congress' grant to the State of Texas to exercise regulatory authority over gambling on the Tribe's reservation was valid. See *Cabazon*, 480 U.S. at 207 (discussing plenary powers of Congress over tribes).

(emphasis added). The district court turned the law on its head by construing an explicit, statutory prohibition as a specific grant of authority to the State. Section 1300g-6(b) reads, "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."

Defendants appealed both orders. The Fifth Circuit affirmed the decision on the waiver of immunity from suit. See *Texas v. Ysleta del Sur Pueblo*, 237 F.3d 631, cert. denied, 121 S. Ct. 2216 (2001) (unpublished).

Defendants filed their Original Answer denying the State's allegations and the Pueblo counterclaimed seeking a declaration (1) that the Pueblo may engage in any game of prize, chance, and consideration in which the State or any person may engage, and (2) that the Pueblo's gaming activities are not prohibited. The State filed a Motion for Summary Judgment on its claims against all Defendants. Defendants responded with considerable evidence in opposition to the State motion. Defendants filed their Motion for Summary Judgment on the Pueblo's counterclaim with evidence supporting the counterclaim.

On September 27, 2001, the district court entered its Order Granting Summary Judgment and Injunction in favor of the State, as well as its Order Denying Defendant's Motion for Summary Judgment. In its Memorandum Opinion, the district court adopted and applied the earlier conclusion of

law in its January Order concerning the complete assimilation of Texas laws. The court later awarded the State its attorney's fees based on the same reasoning. The Fifth Circuit affirmed the district court's rulings in all respects.

ARGUMENT

This Court should issue the writ of certiorari in order to correct a grave miscarriage of justice.

Although it has been reiterated that this Court is not primarily concerned with correcting errors in lower court decisions, this Court has accepted cases for review for no other apparent reason. Robert L. Stern *et al.*, Supreme Court Practice 193 (7th ed. 1993) ("Stern"). The commentators describe *Chicago & N. W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) as a case in which certiorari was granted for no reason other than an obviously incorrect application of the federal pre-emption doctrine. Stern at 192. This case involves many obvious and egregious errors including the misapplication of the pre-emption doctrine in Indian jurisprudence, the misapplication of rules determining which of the conflicting provisions of different statutes governs, the misuse of rules of statutory construction, the misuse of legislative history, and the abuse of the opinion writing process in violation of Constitutional strictures. It also involves an Indian tribe which faces catastrophic injury because these fundamental errors have granted the State of Texas regulatory power over the Pueblo's reservation despite a specific Congressional prohibition. In *Williams v. Lee*, 358 U.S. 217, 218 (1959), certiorari was granted because of a "doubtful determination" by the court below "of the important question of state power over Indian affairs."

Nor should this Court be dissuaded from granting the writ because it failed to do so in *Ysleta I.* In *United States v. Sandoval*, 231U.S. 28, 48 (1913) this Court decided that it was not bound by previous language it had employed in

describing the status of Indian Pueblos because its "observations . . . were evidently based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available[.]" In *Ysleta I*, the Fifth Circuit requested post-argument that the Pueblo provide it with the legislative history of the Restoration Act and thereafter began sifting it for support of its decision. The Pueblo was not accorded the opportunity to brief or argue the significance of the legislative process by which the House concurred in the Senate's amendment of the act. In the present case, the Pueblo did have the opportunity to explain the controlling significance of the House rules and the actions of the Committee Chairman. The district court, however, decided it was bound by the decision in *Ysleta I* and the Fifth Circuit would not even bother writing on the issue in affirming the district court.

A. The Fifth Circuit committed fundamental errors in *Ysleta I* by holding that the Pueblo's Restoration Act and not IGRA governs gaming activities of the Pueblo's reservation.

In Part III(B) of its opinion in *Ysleta I*, the Fifth Circuit found that the ability of the State of Texas to file suit in federal court under 25 U.S.C. § 1300g-6(c) to enjoin a violation of the provisions of 25 U.S.C. § 1300g-6(a) constituted an enforcement procedure fundamentally at odds with the concepts of IGRA. 36 F.3d at 1334. Instead of enforcing the provisions of IGRA as the more recent of the two statutes, *see United States v. Tynen*, 78 U.S. 88, 92 (1870), and, *District of Columbia v. Hutton*, 143 U.S. 18, 26 (1892), the court held that IGRA, as a general statute, could not impliedly repeal the terms of the earlier enacted Restoration Act. In finding the Restoration Act the specific statute, the Fifth Circuit misapplied Supreme Court precedent, misread the provisions of IGRA, and employed various non-sequiturs.

After citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) and *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), the Fifth Circuit decided that the Restoration Act was the specific statute because it applies to two Indian tribes located in one state while IGRA applies to all tribes nationwide. 36 F.3d at 1335. Neither *Crawford* nor *Radzanower* stand for such a proposition.[2] With respect to the gaming issues presented, IGRA was actually the more detailed and specific statute. The primary purpose of the Restoration Act was restoring the federal trust status of two tribes. The Restoration Act therefore covers more than gaming; it also addresses the Tribe's federal trust status, its reservation, and tribal membership. IGRA, on the other hand, is devoted entirely to one subject: "the establishment of Federal standards for gaming on Indian lands . . . ." 25 U.S.C. § 2702(3). Because IGRA covers the same ground as the Restoration Act's gaming provision, but does so in a much more detailed way, IGRA controls. "[A] precisely drawn, detailed statute pre-empts more general remedies." *Brown v. GSA*, 425 U.S. 820, 834 (1976); see also *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503-04 (1936) (when a new statute covers the whole subject of an old one, and adds new provisions, the former statute is repealed by implication).

The Fifth Circuit decided the Restoration Act was specific because Congress "stated in two separate provisions of IGRA" that it should be considered in light of other federal

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[2] In *Crawford* no conflict existed between the statutes because one dealt with witness fees while the other dealt with court-appointed expert fees. In *Ysleta I* both statutes dealt with gaming on the reservation. In *Radzanower* the court interpreted both statutes in a way that did no violence to the underlying purpose of each statute; furthermore, the Court was careful to note that the claimed injury was "hardly an insurmountable burden in this day of easy and rapid transportation." 426 U.S. at 156. Such is not the case here where a poverty-stricken tribe is prevented from significant economic activity.

law. 36 F.3d. at 1335. The first citation is to 25 U.S.C. § 2701(5), a congressional finding wherein Congress merely noted the present condition of the law concerning tribes' ability to regulate gaming activity, law which Congress amended in IGRA. The declaration of congressional policy in the very next section of IGRA sets forth the scope of such amendment: "The purpose of this chapter is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]" 25 U.S.C. § 2702(1).

The other citation is to 25 U.S.C. § 2710(b)(1)(A) which provides that an "Indian tribe may engage in . . . class II gaming . . . if such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)[.]"[3] The litigation In *Ysleta I* was concerned with class III gaming, not class II gaming. IGRA provides that "Class III gaming activities shall be lawful on Indian lands only if such activities are located in a State that permits such gaming for any purpose, by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). The class II parenthetical phrase "(if such gaming is not otherwise specifically prohibited on Indian lands by federal law)" is conspicuously absent from the provisions dealing with class III gaming. Where "Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion." *Rodriguez v. United States*, 40 U.S. 522, 525 (1987) (citations omitted).

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[3] The Senate Report makes clear that the reference is to the Johnson Act (15 U.S.C. § 1171 et seq.). *See* S. Rep. No. 446, 100th Cong., 2d Sess. 35, reprinted in 1988 U.S.C.C.A.N. 3071, 3082.

The Fifth Circuit also found the Restoration Act to be the specific Act because IGRA did not include a blanket repealer clause, and because five years after Congress enacted IGRA it provided that IGRA would not be applicable to a tribe in South Carolina. Neither proposition supports the court's conclusion. Since the provisions of a later enacted general statute do not repeal the provisions of an earlier enacted specific statute, it is the general statute that is in need of a blanket repealer. Any conflicting provisions of later enacted specific statute would be controlling without a blanket repealer under the last in time rule and because the statute is specific. Finally, Congress did not indicate in IGRA, enacted one year after the Restoration Act, that its preemptive provisions did not apply to the Pueblo.

In view of the language and structure of IGRA, other courts have held that it governs gaming by tribes even where a prior federal statute may be thought to have established a different scheme. For example, in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 651 (W.D. Wis. 1990), the court rejected the contention that tribes in States governed by Pub. L. 280 would be outside the scope of IGRA. *See* also *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), cert. denied, 516 U.S. 912 (1995). Again, in *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991), the Tenth Circuit dealt with the argument that the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, created a different set of rules than IGRA. "As the most recent and more particular enactment of federal law, IGRA controls." *Id.* at 1180 n.19.

Finally, in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994), the First Circuit held that, despite statements in the legislative history of IGRA indicating that the Narragansett Tribe would not be covered, the unambiguous language of the

statute required its application. The Court stressed that IGRA was the subsequent statute and that its comprehensive plan should not be violated by creating an exception for a single tribe based on legislative history. 19 F.3d at 704. This is an easier case in that regard, since there are *no* statements in the legislative history of IGRA indicating that the Ysleta del Sur Pueblo would be exempt from its provisions.[4]

While each of these cases necessarily deals with a different statute and a different question of statutory reconciliation, together they illustrate that the courts have generally insisted on applying IGRA rather than the various federal statutes that preceded it. This question is of profound practical significance to the two tribes governed by the Restoration Act,[5] and widespread doctrinal importance to all litigants who must deal with clashing federal statutes.

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[4] Congress later directed a different result for the Narragansett Tribe in a specific statute applicable only to that Tribe, *see* 25 U.S.C. § 1708(b), but that statute, as well as a specific exemption subsequently enacted for the Catawba Tribe, see 25 U.S.C. § 941*l*, simply illustrate that Congress is ready to adopt a statutory remedy where an exception to IGRA's general scheme is required.

[5] In addition to the Tigua Indians of the Ysleta del Sur Pueblo, the Restoration Act also restored a trust relationship between the federal government and the Alabama-Coushatta Indian Tribes of Texas. *See* 25 U.S.C. §§ 731 *et seq.* The Alabama-Coushatta currently have litigation pending in the United States District Court for the Eastern District of Texas, asking for a declaratory judgment in determining their rights concerning gaming under the Restoration Act. *See Alabama-Coushatta Tribes of Texas v. Texas*, No. 01-CV-299 (E.D. Tex. filed Nov. 21, 2001). The provisions of 25 U.S.C. § 737 pertaining to gaming on the reservation of the Alabama and Coushatta Indian Tribes are the same as those contained in section 1300g-6.

B. The Fifth Circuit's construction of the Restoration Act's scope of gaming provision in *Ysleta I* constitutes an unconstitutional advisory opinion.

Although the Fifth Circuit wrote in Part III(A) of its opinion that Congress did not enact the gaming provisions of the Restoration Act with an eye towards *Cabazon*, *Ysleta I* at 1333-34, it did not delineate the scope of federal prohibition. Furthermore, nothing the panel may have said about scope of gaming was necessary to support its decision and is therefore dicta. See p. 10, infra. "Issue preclusion attaches only to determinations that were necessary to support the judgment in the first action." 18 C. Wright & K. Graham, Federal Practice and Procedure, § 4421, p. 192 (1981). Furthermore, it was improper for a court which lacked jurisdiction to remark on the merits of the case. *See* 18 C. Wright & K. Graham, Federal Practice and Procedure, § 4421, p. 207 (1981). Lacking a case or controversy concerning the scope of gaming because it lacked jurisdiction, the panel's dicta lacks persuasive authority as a result of the panel's unconstitutional exercise of jurisdiction. *See* U.S. Const art. III, § 2.[6]

C. The Fifth Circuit committed fundamental errors in *Ysleta I* by holding that Congress did not enact the gaming provisions of the Restoration Act with an eye towards *Cabazon*.

In order to implement what it saw as a pivotal behind-the-scenes legislative deal, the Fifth Circuit in *Ysleta I* ignored the plain language of the Restoration Act and focused on the legislative bill that was not enacted. Along the way, it refused to follow this Court's guidance in interpreting laws

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[6] Cf. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998) (Scalia, J.) (rejecting the use of "hypothetical jurisdiction" to decide merits question before reaching jurisdictional issues).

dealing with Indian tribes, displayed indifference to the legislative procedure, and rendered portions of the Restoration Act incapable of reasoned application. Because the Fifth Circuit's approach to this issue of statutory interpretation runs contrary to the guidance given by this Court and to other decisions utilizing the same terms in Indian law, it should be reviewed and reversed by this Court.

Section 107(a) of the Restoration Act contains a relatively straightforward command: "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." 25 U.S.C. § 1300g-6(a). This command looks at gaming in terms of "activities" and prohibits the Tribe from engaging in an activity only when that activity is "prohibited" by the laws of Texas. The term "prohibited"—indeed the concept of a prohibited "activity"—had a distinct meaning in the body of Indian case law that existed at the time that the Restoration Act was passed. Beginning with this Court's decision in *Bryan v. Itasca*, 426 U.S. 373 (1976), the federal courts distinguished between regulatory and prohibitory laws for the purpose of determining the applicability of state statutes on Indian lands.

This Court endorsed the distinction in *Cabazon* by holding that because California merely regulated the type of gaming at issue (bingo), but did not prohibit it completely, the regulatory statutes did not become part of the State's criminal laws that would be binding on the reservation. *Cabazon* was decided when H.R. 318 was being deliberated by Congress. In light of *Cabazon*, section 107 was amended when H.R. 318 reached the Senate to provide, "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe." 133 Cong. Rec. 20,957 (1987). Thus, when Congress used the term "prohibited" in the Restoration Act, it plainly intended to codify the distinction between regulatory and

prohibitory laws adopted in Cabazon. *See Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) (Congress is presumed to legislate against the background of existing law); *Green v. Bock Laundry*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (selecting statutory meaning "most compatible with the surrounding body of law into which the provision must be integrated").

The language of section 107(b) confirms that the *Cabazon* distinction applies to the gaming section of the Act: "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 25 U.S.C. § 1300g-6(b). Congress employed both aspects of the prohibitory/regulatory distinction from *Cabazon*. It not only directed that a gaming activity "prohibited" by state law would be prohibited on the reservation, but also declared that the State would not have "regulatory" power over gaming on the Reservation.

In other contexts, federal courts have continued to apply the *Cabazon* distinction to questions of whether particular state laws will apply on Indian reservations whether of their own accord or as part of a federal scheme. *See*, e.g., *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991) (applying prohibitory/regulatory distinction to state motor vehicle speeding law under Pub. L. 280); *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 307 (9th Cir. 1993) (applying prohibitory/regulatory distinction to state fireworks law under Pub. L. 280); *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300, 1312 (D.D.C. 1987) (applying prohibitory/regulatory distinction to state gaming law under the Assimilated Crimes Act). The Fifth Circuit's refusal to apply the prohibitory/regulatory distinction is all the more astonishing insofar as the statute here explicitly prohibits those activities that are "prohibited" under state law, but explicitly states that the State will have no "regulatory" power. 25 U.S.C. § 1300g-6(b).

The court in *Yselta I* refused to interpret the Restoration Act in accordance with its express language and with *Cabazon* and instead relied on an egregious misuse of legislative history. In the first place, in what appears to be a startling new record for over-reliance on legislative history, the court drew inferences not from the presence, but from the absence of certain comments in committee reports. After noting that the committee reports accompanying IGRA made explicit reference to *Cabazon*, the panel emphasized, "No such express recognition of *Cabazon Band* appears in the committee reports accompanying the Restoration Act." *Ysleta I*, 36 F.3d at 1333.

Worse still, *Ysleta I* focused on legislative history of a bill in the 99th Congress, H.R. 1344, that was not enacted into law. After Texas officials pressed for a strict limitation on tribal gaming, the Tribal Council adopted a Resolution urging language that all gaming "as defined by the laws and administrative regulations of the State of Texas . . . shall be prohibited." *Id.* at 1328. This exact language was then embodied in the Senate's amendments to H.R. 1344, but that bill died with the close of the 99th Congress.

The bill to restore the trust relationship between the United States and the Ysleta del Sur Pueblo was reintroduced at the outset of the 100th Congress with similar language. However, subsequent to the decision in *Cabazon*, the Senate changed the language of § 107(a):

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe.

133 Cong. Rec. 20,957 (1987). In analyzing these events, *Ysleta I* focused on the Pueblo's Resolution, which it characterized as a "political accommodation" having "critical importance to our resolution of this case," 36 F.3d at 1328 & n.2, and the notion of a legislative deal underlying the language adopted in the 99th Congress. "Congress clearly

was concerned with enacting the compromise between the Tribe, the State and [the] various members of the Texas congressional delegation." *Id.* at 1333. But *Ysleta I* failed to focus on the fact that the language used by the 99th Congress was not the language ultimately adopted by the 100th Congress. The Senate plainly changed the language of the bill to incorporate the *Cabazon* distinction.[7]

The significance of the Senate's amendment was highlighted during final action on the legislation in the House by its floor manager, Congressman Morris K. Udall, Chairman of the House Interior and Insular Affairs Committee. On August 3, 1987, Chairman Udall had the Senate's amended version of H.R. 318 read aloud in the House and asked for unanimous consent to the Senate Amendments. Representative Rhodes of Arizona, reserving a right to object, requested clarification of the Senate Amendments. In response, Representative Udall explained:

> The Senate amendment makes changes to sections 107 and 207 of the bill. These sections deal with the regulation of gaming on the respective reservations of the two tribes. It is my understanding that the Senate amendments to these sections are in line with the rational of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for these tribes

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[7] Testimony introduced at a hearing on the State's request for a permanent injunction in *Alabama-Coushatta Tribes of Texas v. Texas*, No. 01-CV-299 (E.D. Tex.) during the first week of April, 2002, further demonstrates that the Senate's amendment to the gaming provisions of the Restoration Act incorporate the *Cabazon* distinction. *See* Pertinent portions of the testimony of Virginia Boylan and Frank Ducheneaux in Appendix at 97a. Between 1979 and 1993, Ms. Boylan worked as an attorney on the United States Senate Committee on Indian Affairs. Mr. Ducheneaux served as counsel on Indian affairs to the Committee on Interior and Insular Affairs of the United States House of Representatives.

> the holding and rational adopted in the Court's opinion in the case.

133 Cong. Rec. 22,114 (1987) (emphasis added). After the explanation, Rep. Rhodes withdrew his objection and the bill passed by unanimous consent. *See id.*; Pub. L. 100-89, 101 Stat. 672 (1987).[8]

The Fifth Circuit relied on history from a prior session of Congress, addressing language that was not enacted, while at the same time ignoring the explanation of the relevant Committee Chairman, given at the moment of final passage and addressing the language that was actually adopted by Congress. The court was so engrossed with its notion of a legislative "deal" underlying some early versions of the bill that it failed to recognize that the language ultimately adopted was different. Legislative history does not need to be consulted when the statutory language is clear, and the key to interpretation of this statute was the pre-existing body of law drawing a distinction between prohibited and regulated activities.

D. The district court and the Court of Appeals below compounded the errors in *Ysleta I* by expounding upon the Fifth Circuit's dicta that Congress did not enact the gaming provisions of the Restoration Act with an eye towards *Cabazon*.

Petitioners argued before the district court that Part III(A) of the *Ysleta I* opinion was impermissible dicta and erroneous and that the court should apply the *Cabazon* distinction in determining whether particular gaming activities were prohibited by the Restoration Act. The court, without

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[8] Under the relevant House rules, only the Committee Chair or another authorized Committee member was permitted to make a request to act on Senate amendments by unanimous consent. 133 Cong. Rec. 2,676 (1987).

responding to the argument, stated that it was not dicta, Memorandum Opinion, Appendix at 58a. The district court did, however, express doubt about the reliance on legislative history in *Ysleta I*, Appendix at 59a-60a, but held that the decision "foreclosed" exploration of the meaning of § 107 of the Restoration Act and ordered closure of Speaking Rock, Appendix at 50a. In reaching its decision, the district court expressly adopted the earlier finding that the statutory admonition in 25 U.S.C. § 1300g-6(b) that nothing in the gaming provisions of the Restoration Act shall be construed as a grant of regulatory jurisdiction to the State was, in fact, a valid grant to the State to exercise regulatory authority over gambling on the Pueblo's reservation. Based on that finding, the district court reasoned, "The problem here is that the Defendant Tribe has not even attempted to qualify under the rules, regulations or licensing requirement of the State of Texas . . ." Memorandum Opinion, Appendix at 63a. This is precisely what Congress, by express language in section 1300g-6(b), rejected. In a one-sentence opinion, the Fifth Circuit affirmed the decision of the district court "essentially for the reasons stated in its careful, thorough September 27, 2001 Memorandum Opinion." Appendix at 2a.

CONCLUSION

Petitioners respectfully request that this Court grant its petition for a writ of certiorari

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Jan. 17, 2002]

No. 01-51129

D.C. Docket No. EP-99-CV-320-GTE

STATE OF TEXAS,
Plaintiff-Counter Defendant-Appellee,

v.

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; CARLOS HISA, Tribal Lieutenant Governor; FRANCISCO HERNANDEZ, Tribal Gaming Commissioner; ALBERT ALVIDREZ, Tribal Governor,
Defendants-Counter Claimants-Appellants.

Appeal from the United States District Court for the
Western District of Texas, El Paso

Before KING, *Chief Judge*, HIGGINBOTHAM and DAVIS, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellants pay to the appellee the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Jan. 17, 2002]

No. 01-51129

STATE OF TEXAS
Plaintiff-Counter Defendant-Appellee,

VERSUS

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; CARLOS HISA, Tribal Lieutenant Governor; FRANCISCO HERNANDEZ, Tribal Gaming Commissioner; ALBERT ALVIDREZ, Tribal Governor,
Defendants-Counter Claimants-Appellants.

Appeal from the United States District Court for the
Western District of Texas, El Paso
EP-99-CV-320GTE

Before KING, *Chief Judge*, HIGGINBOTHAM and DAVIS, *Circuit Judges*.

PER CURIAM: *

We affirm the judgment of the district court essentially for the reasons stated in its careful, thorough September 27, 2001 Memorandum Opinion.

AFFIRMED, STAY VACATED.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Feb. 13, 2002]

No. 01-51129

STATE OF TEXAS,
Plaintiff-Counter Defendant-Appellee,

v.

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; CARLOS HISA, Tribal Lieutenant Governor; FRANCISCO HERNANDEZ, Tribal Gaming Commissioner; ALBERT ALVIDREZ, Tribal Governor,
Defendants-Counter Claimants-Appellants.

Appeal from the United States District Court for the
Western District of Texas, El Paso

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 1/17/02, 5 cir., _____, _____ F.3d _____)

Before KING, *Chief Judge*, HIGGINBOTHAM and DAVIS, *Circuit Judges*.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

Judge Edith H. Jones did not participate in the consideration of the rehearing en banc.

APPENDIX D

UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF TEXAS

[Filed Dec 3, 1999]

No. EP-99-CA-320-H

STATE OF TEXAS

Plaintiff,

v.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL ACTING GOVERNOR FILBERT CANDELERIA, and GAMING COMMISSIONER FRANCISCO HERNANDEZ

Defendants.

Dec. 3, 1999

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

This is the case that asks the question: can the State of Texas enjoin gambling activities taking place on an Indian reservation located within its borders? [1] On September 27, 1999, the Attorney General of the State of Texas ("AG") commenced this action to enjoin Defendants from operating a gaming facility called "Speaking Rock Casino," located on the Ysleta del Sur Pueblo Tribe ("Tribe") reservation. In response, the Defendants, a group which includes the Tribe itself along with two tribal officials and the Tribal Council,

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[1] Certain forms of gambling are prohibited in Texas. *See* Tex. Pen. Code Ann. § 47.01 et seq.; *see also* Tex. Const. Art. 3 § 47(a) (directing state legislature to pass anti-gaming laws).

filed a motion to dismiss pursuant to Federal Rules of Civil Procedure ("F.R.C.P.") 12(b)(1), 12(b)(6), and 12(b)(7). On November 12, 1999, Plaintiff responded. This case is now ripe for decision.

A. Background

The members of the Tribe are descendants of Indians who fled from New Mexico in the Pueblo Revolt of 1680. *See* W.H. TIMMONS, EL PASO: A BORDERLANDS HISTORY 17-24 (1990). After following the defeated Spaniards south, the Indian refugees, composed of members of several tribes, settled near what is now San Elizario, Texas, and formed what came to be known as the Ysleta del Sur Pueblo. *See id.* Throughout the eighteenth and nineteenth centuries, the Tribe retained a kinship-based tribal government. *See id.* at 181. In 1895, the Tribe adopted a constitution and by-laws to protect its traditions and culture from "Mexicanization." *See id.* In 1967, the State of Texas recognized the Tribe, and established the present reservation. *See id.* at 260. The following year, the federal government also recognized the Tribe, but delegated all its administrative responsibilities to the State of Texas. *See Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1327 (5th Cir.1994) ("*Ysleta I*").

In the mid-1980s, amidst concerns regarding the constitutionality of the arrangement, Congress established a new federal trust with the Tribe. *See Ysleta I*, 36 F.3d at 1327-28; Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. § 1300g *et seq.* (1987) ("Restoration Act"). The Restoration Act purported to prohibit gambling on the reservation by incorporating state law; however, the Tribe tried to compel Texas to negotiate a "Tribal-State compact" pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. (1987). *See Ysleta del Sur Pueblo v. State of Texas*, 852 F.Supp. 587, 588-89 (W.D.Tex.1993). The Tribe hoped that an IGRA compact would result in federal authorization

of reservation gambling. The Fifth Circuit Court of Appeals ultimately resolved the question in favor of the State of Texas by holding that the Restoration Act, as opposed to IGRA, would govern the gambling question were a proper suit to arise. *See Ysleta I*, 36 F.3d at 1335-36.

Despite the implications of the Fifth Circuit's holding, the Speaking Rock Casino began operating in 1993. In 1998, however, the Tribe commenced a suit against the State of Texas for declaratory and injunctive relief to validate reservation gambling after the Governor of Texas opined that the Tribe was violating the Restoration Act. *See Ysleta del Sur Pueblo v. Bush,* No. P-98- CA-47, (W.D.Tex.Aug.7, 1998) ("*Ysleta II*"). The district court found that Texas had not waived its Eleventh Amendment immunity, and dismissed the case. *See id.* The Fifth Circuit affirmed, and the Tribe is now petitioning for a writ of certiorari from the United States Supreme Court. (Def. Mot. to Abate.)

Having also determined that activities at Speaking Rock were in violation of the Restoration Act, the AG commenced the instant lawsuit. In their motion to dismiss, Defendants raise the following claims: (1) Congress never waived the Tribe's sovereign immunity, (2) the United States must be joined as an indispensable party before the AG can proceed, and (3) the AG lacks capacity to sue the Tribe on behalf of the State of Texas.

B. Waiver of Sovereign Immunity

Defendants first argue that nothing in the Restoration Act constitutes a waiver of the Tribe's sovereign immunity. Alternatively, Defendants argue that the question of whether Plaintiff can bring suit should be governed by Public Law 280.[2] The Supreme Court has determined that Public Law

[2] Public Law 280 is codified at 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a). *See* Pub.L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-89 (1953). Under Defendants' theory, some of the language of Public Law 280

280 does not constitute a waiver of tribal sovereign immunity. *See Three Affiliated Tribes of Fort Berthold Reserv. v. Wold Eng'g,* 476 U.S. 877, 892, 106 S.Ct. 2305, 2314 (1987). Consequently, Defendants maintain, under either theory the Tribe is immune from suit, and the action should be dismissed.

Indian tribes enjoy common-law immunity from suit traditionally enjoyed by sovereign powers. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978). Although tribes have the power to regulate internal matters, make their own substantive laws, and enforce laws in their own forums, Congress can "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *See id.* at 55-57, 98 S.Ct. at 1676-77 (citing *Talton v. Mayes,* 163 U.S. 376, 384, 16 S.Ct. 986, 989 (1896)). Consequently, Congress may waive tribal immunity, provided that the waiver is "unequivocally expressed." *See id.* at 58-59, 98 S.Ct. at 1677.

The Restoration Act provides that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." *See* 25 U.S.C. § 1300g-6(a). All civil and criminal penalties relating to illegal gambling under state law apply on the reservation, and Congress granted exclusive jurisdiction to federal courts over actions involving gaming violations on the reservation. See 25 U.S.C. § 1300g-6(a-c). Most importantly, the Restoration Act allows the State of Texas to

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mirrors provisions of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 et seq. (1968), even though the former statute applies only to certain tribes outside of Texas. Compare 28 U.S.C. § 1360 and 18 U.S.C. § 1162 with 25 U.S.C. §§ 1321-22. By contrast, ICRA applies to all federally-recognized tribes. *See* 25 U.S.C. § 1301. Hence, Defendants argue, Public Law 280 jurisprudence should apply to tribes in Texas through ICRA.

bring suit in federal court to enjoin any such violations. *See id.*[3]

The Court finds that § 1300g-6 does represent an unequivocal waiver of tribal immunity, and governs the sovereign immunity issue in this case. This holding is reached even though tribal immunity waivers are to be strictly construed, with all ambiguous provisions interpreted in favor of the tribe. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258 (1985); *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766, 105 S.Ct. 2399, 2403-04 (1985). In addition, the Court finds that Defendants' argument regarding Public Law 280 and the ICRA fails since Congress clearly intended to abrogate the Tribe's immunity for purposes of prohibiting gambling. The Restoration Act is an act related to specific tribes, and was passed almost twenty years after ICRA. *See Morton v. Mancari,* 417 U.S. 535, 550, 94 S.Ct. 2474, 2483 (1974) ("[Absent clear intent by Congress], a specific statute will not be controlled or nullified by a general one.") In addition, Public Law 280 does not apply to Texas tribes. More importantly, the Fifth Circuit Court of Appeals has made it clear that the analysis of gambling on the Tribe's reservation is to be governed exclusively by the Restoration Act. *See Ysleta I,* 36 F.3d 1325, 1332-35 (5th Cir.1994) ("the Restoration Act . . . and not IGRA would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law.") Moreover, the Fifth Circuit implicitly repudiated Public Law 280 jurisprudence in *Ysleta I.*[4] Furthermore, tribal immunity

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[3] The statute reads as follows: "[N]othing in this section shall be construed as precluding the *State of Texas* from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." *See* 25 U.S.C. § 1300g-6(c) (emphasis added).

[4] The lower court determined that IGRA directed courts to adopt the analytical framework of the Supreme Court's ruling in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083 (1987) in

is not a defense to a claim for injunctive relief when brought against tribal officials and the Tribe itself. *See TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-681 (5th Cir.1999);[5] *see also Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677. Thus, Plaintiff has established a prima facie basis to proceed.

C. Indispensable Party

Defendants' next argument is that the case should be dismissed, pursuant to F.R.C.P. 12(b)(7), unless the United States is joined as an indispensable party. Defendants claim that the United States may eventually bring its own action against the Tribe concerning the same gaming activities, even if Defendants prevail in this case; thus, the potential exists for "inconsistent obligations." (Def. Mot. at 9.) *See* F.R.C.P. 19(a)(ii). The cases cited by Defendants for the proposition that the United States must be joined in every suit involving a federally-recognized tribe are inapposite. The United States was never joined in *California v. Cabazon Band of Mission Indians,* nor did the Supreme Court express any opinion on joinder in that case. *See* 480 U.S. 202, 107 S.Ct. 1083 (1987). In *Carlson v. Tulalip Tribes of Washington,* the Tenth Circuit Court of Appeals held that the United States was an indispensable party only because that case involved a boundary dispute on lands to which the United States possessed fee title. *See* 510 F.2d 1337 (10th Cir.1975). In this case, federal law incorporates state law for purposes of gambling violations. *See Ysleta I*, 36 F.3d at 1335. Thus, legally there should be no inconsistent obligations, since the

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assessing reservation gambling questions. See *Ysleta De Sur Pueblo*, 852 F.Supp. at 593. *Cabazon* was a Public Law 280 case. Thus, by finding that the Restoration Act, and not IGRA, governed a dispute involving the Tribe, it implicitly rejected the "*Cabazon* /Public Law 280" framework. *See Ysleta I*, 36 F.3d at 1335.

[5] The suit in *TTEA* was brought against the Tribe, two tribal judges, and the Tribal Court.

causes of action are the same. Furthermore, the threat of multiple litigation does not, by itself, necessitate joinder. *See Boone v. General Motors Acceptance Corp.*, 682 F.2d 552, 554 (5th Cir.1982); *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir.1998). Accordingly, Defendant's Rule 12(b)(7) claim should be denied.

D. Capacity to Sue

Defendants' last contention is that the Attorney General lacks the capacity to sue on behalf of the State of Texas.[6] Defendants have met the requirement of F.R.C.P. 9(a) by raising the issue of capacity through "specific negative averment." *See* F.R.C.P. 9(a); 6A C. WRIGHT & A. MILLER FED. PRAC. & PROC. § 1559 (2nd ed. 1990) ("FED PRAC. & PROC."). In addressing a "capacity" claim, a Rule 12(b)(6) motion is favored, given that a court cannot grant relief to a party lacking capacity to sue. *See Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 (2nd Cir.1965); 5 FED. PRAC. & PROC. § 1294. Moreover, having determined that a tribal immunity defense is unavailable, and given that a capacity claim is generally non-jurisdictional, a 12(b)(1) motion is inappropriate. *See TTEA*, 181 F.3d at 680-81; *Brown v. Keller*, 274 F.2d 779, 780 (6th Cir.1960), *cert. denied*, 363 U.S. 828, 80 S.Ct. 1599 (1960) (characterizing capacity claim as non-jurisdictional); *Summers v. Interstate Tractor and Equip. Co.*, 466 F.2d 42, 50 (9th Cir.1972) (same). Consequently, the Court addresses Defendants' capacity claim only as a 12(b)(6) motion.

In analyzing a capacity claim, a federal court must defer to the law of the state in which it sits. *See* F.R.C.P. 17(b). State

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[6] "Lack of capacity" (i.e. a party's right to initiate a suit on behalf of another) should not be confused with "standing" insofar as standing refers to whether a party has a "personal stake in the outcome." *See generally Board of Educ. v. Illinois State Bd. of Educ.*, 810 F.2d 707, 709-10 n. 3 (7th Cir.1987).

law includes constitutions and statutes, as well as judicial decisions construing them. *See* 6A FED. PRAC. & PROC. § 1559; *Klebanow*, 344 F.2d at 297. Thus, the question whether a state attorney general has capacity to sue in a particular case is governed by state law. *See State of Fla. ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 269 (5th Cir.1976); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057, 1058 (E.D.Pa.1969). Although at common law the office of attorney general was endowed with broad powers to act in the public interest, assessment of a state attorney general's power is a state-specific inquiry. *See Shevin*, 526 F.2d at 268-69. Thus, the Court must answer the question through reference to the "whole law" of the State of Texas. *See Klebanow*, 344 F.2d at 297; *cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).

Unlike states such as Maryland, Pennsylvania, and Delaware, no constitutional or statutory provision in Texas grants the AG broad general powers to sue on behalf of the state whenever he or she believes that litigation would be in the public interest. *See Commonwealth of Pa. v. Mid-Atlantic Toyota Distrib.*, 704 F.2d 125, 129 n.7 (4th Cir.1983) (comparing attorneys general in aforementioned states with those in states such as Oklahoma where the office's broad common law authority was eliminated). The general duties of the AG are defined in one provision in the state constitution. *See* TEX. CONST. ART. IV § 21. The AG's powers are further defined in the Texas Government Code. *See* Tex. Gov't Code Ann. § 402.001 *et seq*. Although the AG has the power to "prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals," any admission, agreement, or waiver made by the AG "in a suit to which the state is a party does not prejudice the rights of the state." *See id.* §§ 401.021, 401.004.

More importantly, Texas courts have consistently held that the Texas AG is powerless to act in the absence of explicit statutory or constitutional authorization.[7] Those courts have repeatedly permitted the AG to sue provided that specific authorization could be found in a relevant act.[8] Similarly, they have dismissed actions in which the AG attempted to rely upon implied powers without express authority from the legislature.[9] To the extent that the courts have occasionally broadened the types of actions the AG may bring, or even implied a power to sue, the analysis stemmed from specific

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[7] *See Day Land & Cattle Co. v. State,* 68 Tex. 526, 4 S.W. 865 (Tex.1887) (holding that in the absence of an express law, it would not imply authority from the AG's "general grants of power or imposition of duties . . . [because] in a government in which the duties of all officers, as well as their powers, are defined by written law, no power ought to be exercised for which warrant is not there found."); *Brady v. Brooks,* 99 Tex. 366, 89 S.W. 1052 (1905) (explaining that the framers of the state's constitution had intended to allow "the Legislature to impose upon the Attorney General duties in addition to those expressly defined [in the state constitution] to enable that body to provide that that officer should represent the state in any class of cases where his services should be deemed requisite.")

[8] *See Charles Scribner's Sons v. Marrs,* 114 Tex. 11, 27, 262 S.W. 722, 728 (Tex.1924); *Smith v. State,* 328 S.W.2d 294, 294-95 (Tex. 1959) (per curiam); *Baker v. Wade,* 743 F.2d 236, 242 (5th Cir.1984); *State ex rel. Cavanaugh v. Nelson,* 170 S.W. 814, 815 (Tex.Civ.App.—Amarillo, 1914, no writ).

[9] *See State ex rel. Downs v. Harney,* 164 S.W.2d 55, 56 (Tex.Civ.App.—San Antonio, 1942, writ ref'd w.o.m.) (determining that since the AG's powers could not be enlarged or restricted except in manner authorized by state constitution, AG lacked power to bring action to remove state officials); *Garcia v. Laughlin,* 285 S.W.2d 191, 194 (Tex. 1955) (affirming *Harney*); *State v. Reagan County Purchasing Co.,* 186 S.W.2d 128, 135 (Tex.Civ.App.—El Paso, 1944, writ ref'd w.o.m.) (finding that AG could not determine terms on which public domain could be sold since "acts beyond the scope of his delegated power are not binding on the state"); *Hill v. Tex. Water Quality Bd.,* 568 S.W.2d 738, 740-41 (Tex.Civ.App.—Austin, 1978, writ ref'd n.r.e.) (rejecting AG's "implied common law powers" argument).

statutory provisions, rather than an implied general common law power.[10] Perhaps most importantly, the state legislature has consistently included provisions in its statutes authorizing the AG to sue on the state's behalf whenever it determines that his or her skills are needed.[11] Thus, the "whole law" of Texas indicates that the AG must be given specific authorization in order to bring suit. Cf. *Charles Scribner's Sons,* 114 Tex. at 28, 262 S.W. at 728 ("Fixedness of responsibility is a necessity in government.")

In this case, the AG has cited no statute empowering him to sue the Defendants on behalf of the State of Texas, nor is any grant of authority found in the Texas Penal Code.[12] The AG's claim of authorization through his common law power must be rejected in light of the preceding discussion. Although the AG attempts to characterize § 1300g-6(c) of the Restoration Act as providing him with authority to sue, such a reading would in effect transform Congress into the Texas legislature. *See Mid-Atlantic Toyota,* 704 F.2d at 129 (recognizing that Congress could not redefine powers of state

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[10] *See, e.g., State of Texas v. Scott & Fetzer Co.,* 709 F.2d 1024, 1026 (5th Cir.1983) (determining that state statute allowing AG to recover damages for violation of federal antitrust law permitted him to bring *parens patrie* action); *Agey v. American Liberty Pipe Line Co.,* 172 S.W.2d 972, 974 (1943) (finding clearly implied authorization for AG to enforce civil penalty provision in specific act). Furthermore, to the extent that *Terrazas v. Ramirez* may or may not represent a departure from the general rule, that badly-fractured opinion represents only a small bump on an otherwise smooth jurisprudential plane. *See Terrazas v. Ramirez,* 829 S.W.2d 712 (Tex.1991).

[11] See generally 7 TEX. JUR. 3D § 13 (1980) (listing AG's litigation duties as specified in diverse statutes); *State v. Thomas,* 766 S.W.2d 217, 220 (Tex.1989) (same).

[12] *See* Tex. Pen. Code Ann. § 47.01 et seq.; *see also Lone Starr Multi Theatres, Inc. v. State,* 922 S.W.2d 295, 298 (Tex.App.—Austin, 1996, no writ) (noting that authority to enforce Penal Code is vested exclusively in district and county attorneys, and that AG cannot initiate prosecutions.).

attorney generals); *cf. New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408 (1992) (holding that Congress cannot force state executive officials to enact or administer federal programs). The statute should instead be construed to give the State of Texas the option to enforce its anti-gaming laws in federal court, in accordance with state law. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, (1988) (directing courts to construe statutes to avoid constitutional problems). The burden of proof rests with the AG to identify a source of power authorizing him to exercise this option on behalf of the state. *See Day Land & Cattle,* 68 Tex. at 533-34, 4 S.W. at 867. Thus far, the AG has not met his burden.

Nonetheless, given the competing policy interests in this case, and in light of the fact that dismissal is generally disfavored under the Federal Rules, the Court will afford the AG an opportunity to amend his complaint to properly demonstrate his source of authority, under Texas law, to bring this suit.[13]

It is therefore ORDERED that the Attorney General of the State of Texas file an amended complaint within ten (10) days of the date of this order, specifying the source of his authority under Texas law to enjoin gambling operations. If the Attorney General fails to amend the complaint accordingly within the time specified, Defendants' motion to dismiss under F.R.C.P. 12(b)(6) for lack of capacity will be granted.

It is further ORDERED that in all other respects Defendants' motion to dismiss in the above-styled and numbered cause be, and it is hereby, DENIED.

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[13] Arguably, the AG could characterize Speaking Rock as a "common nuisance" since it appears to be "a place to which persons habitually go for the purpose of . . . gambling in violation of the Texas Penal Code." *See* Tex. Civ. Prac. & Rem. Code § 125.001. The AG has authority to bring suit to abate or enjoin such a nuisance. *See id.* § 125.002. On their face, these statutes appear to confer the necessary authority.

Signed And Entered this 2nd day of December, 1999.

/s/ Harry Lee Hudspeth
Harry Lee Hudspeth
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

[Filed Jan 13 2000]

No. EP-99-CA-320-H

STATE OF TEXAS,

Plaintiff,

v.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL ACTING GOVERNOR FILBERT CANDELERIA, AND GAMING COMMISSIONER FRANCISCO HERNANDEZ,

Defendants.

ORDER DENYING DEFENDANTS' SECOND MOTION TO DISMISS OR, IN THE ALTERNATIVE, REQUEST FOR CERTIFICATE OF APPEALABILITY

This is an action for injunctive relief brought by the Attorney General of the State of Texas ("AG") to enjoin Defendants from operating a gaming facility called "Speaking Rock Casino," located on the Ysleta del Sur Pueblo Tribe ("Tribe") reservation. The background of this case is found in the Court's order of December 3, 1999. *See State v. Ysleta del Sur Pueblo,* 1999 WL 1211427 (W.D.Tex. 1999) ("Ysleta III"). In that order, the Court directed the AG to file an amended complaint alleging constitutional or statutory authority under state law to bring suit against Defendants. On December 16, 1999, the AG filed a first amended complaint alleging capacity to bring suit in the name of the State of Texas to enjoin and abate a public nuisance. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 125.001-002 (Vernon's 1997)

"Civil Practice Code").[1] On December 23, 1999, the Court ordered Defendants to answer the complaint by January 15, 2000. On December 23, 1999, Defendants filed a notice of appeal of the Court's order of December 3, 1999 to the Fifth Circuit Court of Appeals. On January 7, 2000, Defendants filed the present motion in which they ask the Court to dismiss this case under Rules12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[2] In the alternative, Defendants request the issuance of a certificate of appealability under 28 U.S.C. § 1292(b). This matter is now ripe for decision.

A. Application of State Law Under Restoration Act

Defendants request dismissal of this case for lack of subject matter jurisdiction or failure to state a claim on the basis that sections 125.001 and 125.002 of the Civil Practice Code form part of a state regulatory scheme. Under section 107(b) of the Restoration Act,[3] the State of Texas has no

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[1] The statutes allow the AG to enjoin several public nuisances, including the "use of any place for . . . (1) gambling, gambling promotion, or communicating gambling information prohibited by law[.]" *See* Tex. Civ. Prac. & Rem. Code Ann. §125.021.

[2] In addition to the "new" 12(b)(6) and 12(b)(1) motion, Defendants also "reassert" their prior motion to dismiss for lack of subject matter jurisdiction and failure to join an indispensable party. The Fifth Circuit has held that parties do not waive their right to appeal an order dismissing claims by failing to raise the issues in a subsequent motion. *See Wilson v. First Houston Investment Corp.*, 566 F.2d 1235, 1237-1238 (5th Cir. 1978), *vacated on other grounds* 444 U.S. 959, 100 S.Ct. 442; *see also* 6 A. WRIGHT & C. MILLER, 6 FED. PRAC. & PROC. §1476 (2nd ed. 1990). Nonetheless, Defendants have decided to "play it safe" by ensuring that the dismissed claims are preserved for appeal. Accordingly, the Court "redismisses" the previous claims.

[3] *See* Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, §107(b), 101 Stat. 666, 668 (1987) (located at 25 U.S.C. §1300g-6(b)).

general civil or regulatory jurisdiction over the reservation; therefore, Defendants argue, the state public nuisance laws cannot apply on their reservation.

A brief review of the statutory scheme illustrates the flaw in Defendants' reasoning. Section 107(a) of the Restoration Act provides that all gambling activities prohibited under Texas law are also prohibited on the reservation. *See* 25 U.S.C. §1300g-6(a) . Thus any state gambling law becomes federal law for purposes of reservation gambling. *See Yselta del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994), cert. denied, 514 U.S. 1016, 115 S.Ct. 1358 (1995) ("Ysleta I") ("Texas law . . . functions as surrogate federal law.") The reference in section 107(a) makes clear that "state law" encompasses both civil and criminal statutes. *See* 25 U.S.C. § 1300g-6(a). Although federal courts maintain exclusive jurisdiction over cases involving violations of 107(a), Congress empowered the State of Texas to sue in federal court to enforce the civil and criminal provisions through an injunction. *See* 25 U.S.C. §1300g-6(c).[4] The only other provision in the Restoration Act pertaining to gambling provides that "[n]othing in [the gambling] section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. *See* 25 U.S.C. § 1300g-6(b).[5] Thus, the plain wording of sections 107(a) and (c)

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[4] Moreover, other courts have determined that Congress is within its power in making state civil and criminal gambling laws applicable in Indian country. *See United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317, 1324 (C.D.Cal. 1997) (applying 18 U.S.C. §1166(a) which incorporates state civil gambling provisions into federal law); *United States v. E.C. Investments, Inc.*, 77 F.3d 327, 331 (9th Cir. 1996) (addressing 18 U.S.C. §1955 which does the same for criminal statutes).

[5] Section 1300g-6(b) appears to have been derived from two United States Supreme Court opinions. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987); B*ryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 96 S.Ct. 2102 (1976). Although the

evince Congress' s clear intent to limit the Tribe's sovereign immunity by allowing the State of Texas to enjoin reservation gambling using state anti-gaming laws. *Accord Ysleta I*, 36 F.3d 1327-29 (reviewing legislative history of Restoration Act); *Ysleta III*, 1999 WL 1211427 at 2 (rejecting sovereign immunity defense).

Undeniably, sections 125.021 and 125.022 of the Civil Practice Code are state laws pertaining to gambling. In addition, there is no issue here regarding the propriety of using an injunction to stop a criminal violation. Courts may enjoin a potential criminal violation only (1) in cases of national emergency; (2) in cases involving a public nuisance; or (3) in cases where a statute grants a court the power to enjoin a crime. *See United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565 (8th Cir. 1998), cert. denied, 119 S.Ct. 48 (1998). In this case, there is (1) a statute defining as a public nuisance an establishment where state gambling laws are violated; and (2) federal and state statutes authorizing injunctions against state gambling law infractions. Furthermore, as the Eighth Circuit Court of Appeals has made clear, federal courts should employ state remedies (and hence state injunction procedures) to enforce "surrogate" federal gambling laws against tribes. *See id.* (determining that where Nebraska case law provided for injunctive relief against violations of state gaming laws, federal court was required to enforce "surrogate" federal statute with reference to state law remedy).

Supreme Court in those cases determined that Public Law 280 (18 U.S.C. §1162) did not grant to certain states general civil regulatory authority over tribal reservations, it also held that such authority could be granted where expressly provided by Congress. *See Cabazon*, 480 U.S. at 214-15, 107 S.Ct. at 1091; *Bryan*, 426 U.S. at 383-85, 96 S.Ct. at 2108-09. These cases reinforce the notion that Congress's grant to the State of Texas to exercise regulatory authority over gambling on the Tribe's reservation was valid. *See Cabazon*, 480 U.S. at 207, 107 S.Ct. at 1087 (discussing plenary powers of Congress over tribes).

Defendants nonetheless believe that inasmuch as the Civil Practice Code classifies as nuisances prostitution, certain forms of nude dancing, bullfighting, and discharging a firearm in a public place, in addition to gambling, its application here would effectively grant to the State of Texas general civil regulatory jurisdiction over the Tribe, in violation of the Restoration Act. *See* Tex. Civ. Prac & Rem. Code Ann. § 125.001 (listing nuisances). The flaw with this argument is apparent. Hypothetically, if bullfighting was permitted under Tribal law, and the AG was trying to enjoin a matador from entering the reservation bullfighting ring based on state public nuisance law, section 107(b) would come into play. Moreover, the AG in such a case would unlawfully be using a law related to gambling to expand its regulatory jurisdiction over activities for which the Restoration Act expresses no concern. In this case, by contrast, the AG is only using the Civil Practice Code provisions as they pertain to gambling. Under the Restoration Act, these provisions function as federal laws; they empower the AG, as the representative of the State of Texas, to bring a suit in federal court to enjoin gambling on the reservation. *See* 28 U.S.C. § 1300g-6 (a) and (c). Consequently, the motion to dismiss under Rules 12(b)(1) and 12(b)(6) should be denied.

B. Lack of Capacity

Defendants' newest incarnation of its lack of capacity claim is premised on the notion that both state and federal law must explicitly empower the AG to bring suit on behalf of the State of Texas. This argument stems from Defendants' reading of *State of Texas v. Scott & Fetzer Co.*, a case concerning whether the AG was authorized under state law to bring a *parens patriae* action to recover for violations of federal antitrust law. *See* 709 F.2d 1024, 1024-25 (5th Cir. 1983). The federal statute at issue in *Scott & Fetzer* authorized the AG to bring a *parens patriae* action on behalf of the state, provided that the AG was not prohibited from

doing so under state law. *See id.* at 1025. The defendants argued that since the state law authorizing the AG to bring antitrust suits on behalf of the state did not specifically mention *parens patriae* actions, the AG lacked capacity to sue. *See id.* at 1025-26. The majority determined that the state law implicitly authorized *parens patriae* actions; the dissenting judge thought otherwise. *See id.* at 1027, 1029-30. As Defendants read *Scott & Fetzer,* where Congress allows a state attorney general to bring a suit based on state law, the state statute must (a) name a specific defendant (or at least a general category of defendants, such as "federal antitrust law violators"), and (b) authorize the filing of a lawsuit alleging a federal cause of action.

Defendants' contortion of *Scott & Fetzer*, fails for several reasons. First, the state statute at issue in that case did not specifically identify a class of defendants; it simply allowed the AG to recover "damages provided for by the federal antitrust laws." *See* Tex. Bus. & Com. Code Ann. § 15.40 (Vernon's 1987). Rather, the AG could sue any party who violated federal antitrust laws; similarly, the Civil Practice Code authorizes the AG to sue anyone who runs a gambling casino within the state. Second, Defendants have cited no authority in support of the proposition that the state law allowing the AG to enjoin gambling must specifically refer to the Tribe or its reservation. The Restoration Act allows such suits, and only Congress can waive the Tribe's sovereign immunity; thus, there is no need for the State of Texas to also pass a statute authorizing suits against these particular Defendants. Similarly, the state is not obligated to amend its public nuisance statute to specifically mention the federal cause of action; the Restoration Act solves the problem by "federalizing" all state anti-gaming law. *See* 25 U.S.C. §1300g-6(a). Accordingly, the motion to dismiss for lack of capacity should be denied.

C. Certificate Of Appealability Request

Although Defendants have already "jumped the gun" by appealing the Court's ruling on the AG's capacity to sue, they now ask the Court, pursuant to 28 U.S.C. § 1292(b), to certify this issue for an interlocutory appeal. A Court may certify an issue if it involves a controlling question of law for which there is substantial ground for difference of opinion, and if disposition of the issue by the court of appeals might advance the ultimate termination of the litigation. *See* 28 U.S.C. 1292(b).

The Court finds that the request should be denied. Although the lack of capacity issue is a controlling question of law, Defendants have failed to show that there exists a substantial ground for difference of opinion. *See* C. WRIGHT A. MILLER & E. COOPER, 16 FED. PRAC. & PROC. § 3930 (2nd ed. 1996) (noting that a "matter of first impression" is not synonymous with a "substantial ground"). Neither of the Fifth circuit cases cited by Defendants show that a substantial ground for difference of opinion on the capacity issue exists under these circumstances.[6] Moreover, the only real

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[6] The cases cited include *Scott & Fetzer* and League of *United Latin Amer. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc) ("LULAC IV"). In *Scott & Fetzer*, Judge Jolly's dissent focused on the fact that the state as a political entity was not the beneficiary of a *parens patriae* action, and that as such the majority had conferred authority on the AG to act where none had been given by the state legislature. *See Scott & Fetzer*, 709 F.2d 1029. In *LULAC IV*, the majority of circuit judges found that the AG lacked power to make policy for the State of Texas; accordingly, the AG could not ignore the wishes of the other state parties he represented by settling an important apportionment case instead of proceeding with the appeal. *See LULAC IV*, 999 F.2d at 840-843. Four dissenting circuit judges argued that the AG had broad common law authority to act on behalf of the state, and could accordingly halt the appeal. *See id.* At 899, 921-925. The dissent based its conclusions on *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991), a case in which no clear ruling emerged on whether the AG possessed implied common law power to sue on behalf of the state. *See id.*

controversy over the AG's capacity in past cases involved extensions of the scope of certain statutes and constitutional provisions authorizing the AG to sue on the state's behalf. *See, e.g., Scott & Fetzer*, 709 F.2d at 1024. In this case, the federal and state statutes are clear; no ambiguity in wording calls into question the AG's capacity to bring this suit. *See Singh v. Daimler-Benz, AG*, 800 F.Supp. 260, 263 (E.D.Pa. 1992), *aff'd*, 9 F.3d 303 (3rd Cir. 1993) (denying certification where language in disputed statute was clear). More importantly, in the likely event that the Fifth Circuit found the AG had capacity to sue, whether based on common law authority or the Civil Practice Code, the litigation will be considerably delayed by the appeals process, rather than advanced. *See id.* It is time to move away from the capacity question, and begin the next stage of litigation.

It is therefore ORDERED that Defendants' motion to dismiss in all respects be, and it is hereby, DENIED.

It is further ORDERED that Defendants' request for a certificate of appealability under 28 U.S.C. §1292 (b) be, and it is hereby, DENIED.

SIGNED AND ENTERED this 13th day of January, 2000.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

NO. EP-99-CA0320-GTE

STATE OF TEXAS,

VS.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR ALBERT ALVIDRFZ, TRIBAL LIEUTENANT GOVERNOR FILBERT CANDELARIA, AND GAMING COMMISSIONER FRANCISCO HERNANDEZ,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT AND INJUNCTION

On this day came to be considered The State of Texas's Motion for Swmary Judgment and Injunction. Based upon the facts established by the record and the conclusions of law set forth in its Memorandum Opinion of even date herewith, the Court concludes and orders that said Motion should be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED, for the reasons set forth in said Memoranduum Opinion, that the prayer of the Plaintiff, State of Texas, for injunctive relief be, and it is hereby, GRANTED as set forth below, in accordance with the Restoration Act, 25 U.S.C. § 1300g-6 Chapter 47 of the Texas Penal Code, §§ 125.001,125.002 and 125.021 of the Texas Civil Practice and Remedy Code, and Rule 65 of the Federal Rules of Civil Procedure.

REASONS FOR ISSUANCE OF PERMANENT INJUNCTION

The Court finds and concludes that the summary judgment proof in this case has established that the Defendants have violated and are violating 25 U.S.C. § I 300g-6 by engaging in an habitual course of conduct in violation of Chapter 47 of the Texas Penal Code, and that such parties, unless enjoined, will continue to engage in such habitual illegal activities and conduct. More specifically, the named Defendants, Ysleta del Sur Pueblo, Tigua Gaming Agency, the Tribal Council, Tribal Govemor Albert Alvidiez, Tribal Lieutenant Govemor Filbert Candelaria, and Gaming Conxnissioner Francisco Hcernandez knowingly maintain a place located in El Paso Countv, Texas, known as, referred to and advertised as the Speaking Rock Casino, which is geographically located on the Ysleta del Sur Pueblo reservation and which has a street address of 122 S. Old Pueblo Rd., El Paso, Texas 79907, to which persons habitually and regularly go at the invitation of and with the permission of the Defendants, for the purpose of illegal gambling, gambling promotion and communicating gambling information prohibited by, and in violation of the Texas Penal Code, by *inter alia,* providing a place where, among other things, Defendants charge and collect monetary fees resulting in an economic bmefit to them based upon patrons, guests, and customers playing gambling games and betting money on games played with cards, dice and other gambling devicces in violation of § 47 of Article III of the Texas Constitution, Chapter 47 of the Texas Penal Code, § 125.001 and § 125.021 of the Texas Civil Practice and Remedies Code, and 25 U. S.C. §1300g-6. The widespread nature and frequency of such illegal activities as engaged in by Defendants constitute a common nuisance and a public nuisuce and rightfully should be enjoined.

INJUNCTION

It is the Order of the Court by this Injunction, that all such acts, activities and conduct set foith above and also as.set forth below shall permanently CEASE, DESIST, and TERMNATE according to the time-table specified below.

PERSONS AND PARTIES SUBJECT OF INJUNCTION

The Persons and Parties enjoined are as follows:

1. Ysleta del Sur Pueblo
2. Tigua Gaming Agency
3. The Tribal Council of the Ysleta del Sur Pueblo
4. Tribal Governor Albert Alvidrez
5. Tribal Lieutenant Govemor Filbert Candelaria
6. Gaming Conunissioner Francisco Hemandez
7. The officers, agents, servants, employees, and attorneys of the foregoing persons and parties.

ACTIVITIES ENJOINED

The persons and parties enjoined and listed as being subject of injunction are hereby ORDERED to CEASE, DESIST, TERMINATE AND REFRAIN FROM engaging in, permitting, promoting, and conducting activities at the Speaking Rock Casino in violadon of Chapter 47 ofthe Texas Penal Code, and 25 U.S.C. § 1300-6 of Restoration Act, including but not limited to the following activities:

A. Gambling activities played with cards, dice, balls, or any other gambling device where some, any or all of the persons and parties enjoined receive an economic benefit. Specifically prohibited are all card games; all dice games; all games using one or more balls and or a spinning wheel and games involving a vertical spinning wheel, which require players to pay a monetary fee, whether such fee is designated an "Ante," "Rake,'" Service Charge or otherwise.

B. Gambling activities played with cards, dice balls, or any other gambling device where some, any or all of the persons and parties enjoined, charge or collect or attempt to collect any monetvy fee as a requirement for any person to bet on or play any game played with cards, dice, balls or any other gambling device, whether such fee is designated by "Ante," "Rake" Service Charge or othcrwise.

C. Gambling activities played with cards, dice, balls, Keno tickets, bingo ends, slot machines, or any other gambling device where some, any or all of the persons and parties enjoined act directly or indirectly as the "house" or "banker" in the same fashion as the operator of the gambling casino.

D. Providing to any person for his/her use a slot machine, the operation of which results in or is calculated to result in an economic benefit to the owner or lessor of the slot machine.

E. Conducting any gambling game from which any person or party enjoined herein is likely to receive any economic benefit other than personal winnings, including, but not limited to:

1. Bingo or any variation thereof;
2. Scratch tickets, peel tickets, or pull tabs;
3 Keno or any variation thereof;
4. Tigua Dice, Craps, or any variations thereof;
5. Slot Machines;
6. Poker card games;
7. Betting on horse races or dog races;
8. Tigua 21, Blackjack, or any variations thereof;
9. Wheel of Fortune, Big Six Wheel or any variations of wheel games;

F. Allowing other persons or entities to engage in any of the above activities on the premises of the Speaking Rock Casino or anywhere upon the reservation lands ofthe Ysleta del Sur Pueblo or upon any other lands of said Tribe.

Time for Complete Compliance

For the reasons set.forth in its Memorandum Opinion of even date herewith, the Court gives the Defendants until November 30, 2001, within which to bring themselves into full and complete compliance with the Injunction set forth herein.

Court costs are hereby asessed against the Defendants jointly and severally.

SO ORDERED this 27th day of September, 2001.

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

NO. EP-99-CA0320-GTE

STATE OF TEXAS,

Plaintiff,

vs.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR ALBERT ALVIDRFZ, TRIBAL LIEUTENANT GOVERNOR FILBERT CANDELARIA, AND GAMING COMMISSIONER FRANCISCO HERNANDEZ;

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

For the reasons set forth in its Memorandum Opinion of this date, the Court DENIES the Defendants' Motion for Summary Judgment upon its Counter-Claim and GRANTS the Plaintiff's Motion for Summary Judgment upon the Defendants' Conter-Claim.

SO ORDERED this 27th day of September, 2001.

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

NO. EP-99-CA0320-GTE

STATE OF TEXAS,

Plaintiff,

VS.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR ALBERT ALVIDREZ, TRIBAL LIEUTENANT GOVERNOR FILBERT CANDELARIA, AND GAMING COMMISSIONER FRANCISCO HERNANDEZ,

Defendants.

MEMORANDUM OPINION

Before the Court are the Plaintiff State of Texas' Motion for Summary Judgment and also the Defendants' Motion for Summary Judgment. The respective parties have filed responses and replies to both motions, and, on August 22, 2001, the Court took up the motions at a hearing in open court. Finally the Court permitted the parties to file post oral argument supplemental memoranda. Both parties took advantage of the opportunity by filing their respective supplements on August 31, 2001. The Court concludes that there are no genuine issues of fact and that said motions should be disposed of in accordance with the applicable law. For the reasons stated at said hearing, as well as those set out below, the Court will grant the State's Motion and deny the Defendants' Motion.

I. Background

The State of Texas filed this action against the Defendants on September 27,1999, seeking to stop the operation of the Speaking Rock Casino and Entertainment Center (the "Casino") by the Ysleta del Sur Pueblo Indian Tribe (the "Tribe").[1] As stated in Plaintiff's motion for summary judgment the Defendants are:

> [t]he Ysleta del Sur Pueblo tribe, tribal officials, and administrative bodies of the tribe. The Tigua Indian Tribe "own[s] and operate[s]" the casino. Tab B. p. 0000806; Tab A, No.14 (admitting same); Defs' Resp. to Interr. No. 5 (Tab C). The Tribal Council is the tribe's traditional governing body. *See* Ysleta del Sur Pueblo Gaming Ordinance No. 001-96, at 1 (Feb. 14, 1996) (Tab D); Ysleta del Sur Pueblo Tribal Resolution No. TC-06-96 (feb. 14, 1996) (Tab E); *see also* 25 U.S.C. § 1300g(5) (recognizing Ysleta del Sur Pueblo "Tribal Council" (and its successors) as "the governing body of the tribe"); 25 U.S.C. § 1300g-3(b) (specifying that the "Tribal Council shall represent the tribe and its members in the implementation of [the Restoration Act]"). The civil and criminal law authority, indeed, "all inherent governmental power, fiscal authority, and Tribal Sovereignty," of the tribe reside with the Tribal Council. Tab E, p.l. The tribe operates without "organic or written constitution charter, or by-laws" and "does not possess[] any organic documents of governance such as a constitution or By-Laws." *Id.* The Tribal Governor, Albert Alvidrez, is a member of the Tribal Council, as is the Tribal Lieutenant Governor, Filbert Candelaria. *Id* (listing cacique, governor, lieutenant governor, war captain, ajuacil, and four council members as the members of the Tribal council). As members of the Council, and by virtue of their positions, Alvidrez and

[1] The Ysleta del Sur Pueblo Tribe is also known as the Tigua Indian Tribe.

> Candelaria have certain authority over the casino's financial transactions and decisions, *See, e.g.*, tab CC, p. T-4316. The Tigua Gaming Agency supervises and regulates all gaming conducted on Tigua Lands. *See* Tab A, No. 23 (citing Gaming Ordinance No.001-96, §3.003); George Candelaria Aff., p. 1 (Tab F) (noting that Tigua Gaming Agency "regulates all aspects of the Tribe's gaming activities"); Tab D, §§2.002, 3.005-.014. The Commissioner of the Tigua Gaming Agency is Francisco Hernandez, who has supervisory authority for the tribe's gambling activities. *See* Tab A, No. 24 (citing Gaming Ordinance No. 001-96, § 3.003).

The Court accepts the Summary Judgment record cited by Plaintiff as supporting the asserted roles of the various named defendants. The Casino is located in El Paso, Texas on the Tribe's reservation land and has been operating since 1993. Although it opened as a bingo hall, the Casino has greatly expanded its gaming operation since that time and now offers a wide variety of games of chance.[2]

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[2] The gambling activities include slot machines, poker, blackjack, bingo, number games, keno number games, dice games, and off-premises wagering on horse and dog races. In 1996 the Tribal council enacted Gaming Ordinance No. 001-96 which authorized gaming activities on the reservation. That ordinance has been amended. The current gaming ordinance was adopted September 28, 1999. It authorizes "any game containing the elements of prize, chance or skill, and consideration" conducted in conformity with the ordinance's provisions. *See* Tab D, § 1.004(b); Tab NN, T-6 998; and Tab D §§ 2.001(d), 4.001(a). The Council prohibited three categories of gambling: (1) betting on the outcome of elections; (2) betting on the outcome of sports events; and (3) games conducted by use of a "video lottery machine." Tab D, § 1.005(a-(c); Tab NN; T.6999. It appears that the Defendants patterned their Ordinance after the Texas Lottery Act. As noted, *infra*, they argue that the language of the Texas Lottery Act is broad enough to permit the State of Texas to engage in the same gaming activities that are engaged in by the Defendants, and that their Ordinance puts the Tribe in the same position as the State. But see discussion, *infra*.

The Court observed a video presentation prepared by the Defendants which depicts what can best be described as a Las Vegas type casino operation. Its doors are open 24 hours a day, seven days a week. Thousands of persons who are not members of the Tribe and who do not reside on the reservation come to the Casino on frequent occasions to engage in the many gambling activities offered by the Casino. The State seeks to shut it down as a nuisance in violation of the Texas Penal Code and the Restoration Act, 25 U S.C. § 1300g-1 *et seq.* The Defendants, on the other hand, contend that all of the activities occurring within the Casino are permitted to the Tribe pursuant to the Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act, (the "Restoration Act" or the "Act") 25 U.S.C. § 1300g-1 *et seq.*

The Court accepts the Plaintiff's representations as to evidence supporting its Motion for Summary Judgment as set forth on pp 5-17 of its Motion for Summary Judgment and Injunction filed June 12, 2001.

The Court notes particularly the following established facts:

Any adult person aged 21 years or older who furnishes personal identification and who is not a known criminal or enemy of the tribe may participate in the gambling activities offered by the Casino.

The Ysleta del Sur Pueblo tribe realizes significant financial gain and profit from the gambling activities conducted by the Casino.

The Tribe makes available gaming activities to the general public for the purposes of generating revenue for the Tribe.

The Tribe operates the Speaking Rock Casino and Entertainment Center through the Tigua Gaming Agency. The individual members of the Tribe participate in the income and earnings of the enterprise through the receipt of annual payments. For the year 2000, the payment was $15,000 per member.

The casino provides in excess of 1,000 slot machines for its patrons and the tokens used to operate them must be purchased for U.S. currency and can be redeemed for cash.

In order to participate in card games and dice games customers of the casino must pay fifty cents for each game of cards or roll of the dice, resulting in a net revenue gain to the casino.

The Defendants publicly advertise the Casino and its operations in order to attract customers to participate it the gambling activities offered.

The Tribal Governor Albert Alvidrez, the Tribal Lieutenant Governor Filbert Candelaria, the Tigua Gaming Agency, and Gaming Commissioner Francisco Hernandez exercise some control and supervision over the operations and activities of the Speaking Rock Casino and Entertainment Center.

The Defendants are correct in pointing out that there is not, on the present record, any issue of inadequate regulatory oversight. With one exception the Court accepts the Defendants' statement and exhibits with respect to the Pueblo's oversight, to-wit:

> Gaming on the Pueblo's reservation is governed by provisions of the Pueblo's Gaming Ordinance (Pueblo's Opposition Ex. F), which provides for regulatory oversight by an independent tribal agency, the Tigua Gaming Agency. Financial and internal controls are in place. *See* State's Supplemental Appendix, Ex. 4, Certified Audit (under seal); Ex. 6, Background Investigation Forms; Ex. 7, Vendor License; Ex. 12, Finance and Accounting Manual; Ex. 13, Cash Operations Manual; and Ex. 14, Tracking Paperwork. There has been no evidence offered nor any suggestion of any type of improper or criminal activity being carried out at the Pueblo. Moreover, prior to sanitizing by the attorneys for the State, the State's expert

expressed a similar opinion. In his draft report Mr. William Holmes, a former FBI agent proffered by the State as an expert in gambling, wrote:

> The Speaking Rock Casino is a well managed casino with a compliment of dedicated employees. Their security procedures appear to be efficient and responsible. There is a separation of powers from the standpoint the Tigua Gaming Agency answers to the Tribal Council. (Pueblo's Opposition Ex. 0, Ex. 84.)

The statement was removed at the request of the Attorney General. The Attorney General's expressed concern about regulatory oversight is wrong.

See Defendants Post Oral Argument Statement, pp 2-3.

The one exception is that the Court does not agree with Defendants' statement that there is no evidence or suggestion "of any type of improper or criminal activity being carried out at the Pueblo." The Court accepts, however, that the security arrangements were, and are, good.

A. Prior Actions

This lawsuit is not the first involving this Tribe's casino operation on its reservation land. In April of 1993, the Tribe sued the State in this federal court seeking a court order directing the State to enter into negotiations for the formulation of a Tribal-State compact, pursuant to the Indian Gaming Regulatory Act, ("IGRA"),[3] and sought a determination as to which games were the proper subject of such negotiations. *See Ysleta Del Sur Pueblo v. Texas*, 852 F. Supp. 587, 5 89 (W.D. Tex. 1993). The district court found that the State of Texas effectively permitted the types of games in which the Tribe sought to engage, and that, under IGRA, the State could,

[3] IGRA is codified at 25 U.S.C. § 2701 *et seq.*

therefore, not refuse to negotiate a Tribal-State compact. The U.S. District Court required the State to enter into such a compact within 60 days of its order, *Id*, at 597.

The State appealed, and the United States Court of Appeals for the Fifth Circuit reversed. *See Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) *(Ysleta 1)*. In its opinion, the Fifth Circuit determined that the Restoration Act, and not IGRA, governed the case. *Id* at 1335. It then concluded that the State had not waived its Eleventh Amendment sovereign immunity from suit and accordingly reversed and remanded the case with instructions for the district court to dismiss the Tribe's suit. *Id* at 1335-36.

In 1998, the Tribe brought another lawsuit against the State of Texas for declaratory and injunctive relief after the State's Governor opined that the Tribe was violating the Restoration Act by its operation of the Casino. *See Ysleta del Sur Pueblo v. Bush*, No. P-98-CA-47. The district court concluded that the State had not waived its Eleventh Amendment immunity, and dismissed the case. The Fifth Circuit affirmed.

After this lawsuit was commenced by the State of Texas in September, 1999, the Defendants filed a motion to dismiss arguing that (1) Congress never waived the Tribe's sovereign immunity; (2) the United States must be joined as an indispensable party; and (3) the Attorney General lacked the capacity to sue the Tribe on behalf of the State. *Texas v. Ysleta Del Sur Pueblo*, 79 F. Supp.2d 708, 710 (W.D. Tex. 1999). The district court [4] on December 2 1999, held against the Tribe on the first two issues but found some merit in the lack of capacity argument. Nevertheless, it denied the Defendants' Motion, and allowed the State to amend its Complaint thereby affording the Attorney General an opportunity to demonstrate the source of

[4] The Honorable Harry L. Hudspeth.

his authority to bring the suit.[5] *Id.* at 714. After the Attorney General filed an Amended Complaint, the district court, by its order of January 13, 2000, overruled another motion to dismiss, concluding that the Attorney General had the authority to bring this action. Because of the importance of both of these decisions and their relevance to many of the issues presently in the case, the Court will later herein quote there from at some length.

B. Legislative History

Although the Tribe traces its roots back to Indian refugees who fled from New Mexico in the Pueblo Revolt of 1680, it was not officially recognized by the State of Texas until 1967, when its present 100-acre reservation was established. *See Texas v. Ysleta*, 79 F. Supp.2d at 709 (citing W.H. TIMMONS, EL PASO: A BORDERLANDS HISTORY, 17-24 (1990)). In 1968, the federal government first recognized the tribe, and this Court now quotes from the Fifth Circuit's very pertinent and extensive review of the history behind the Restoration Act beginning in that year:

> In 1968, the federal government recognized the Tiwa Indians of the Ysleta del Sur Pueblo as an Indian tribe but simultaneously transferred responsibility for the Indians to the state of Texas. *See* Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968). Although the Tiwa Indians Act constituted legal recognition of the Indians, it had no practical effect on the relationship between the federal government and the Tribe because "[t]he Tribe had not been subject to federal supervision and had received no federal Indian services before the 1968 Act and that status continue [sic] after its enactment." S. REP. NO. 90, 100th

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[5] In a footnote, the district court stated that the Attorney General could characterize the Casino as a common nuisance operating in violation of the Texas Penal Code. The court went on to state that the Attorney General has the authority to bring suit to enjoin such a nuisance. *Texas v. Ysleta*, 79 F. Supp.2d at 714, n. 13. This Court agrees with Judge Hudspeth's opinion but also accepts his rulings as the "law of the case."

Cong., 1st Sess. 7 (1987). Instead, Texas administered the Tribe's affairs, which included holding the Tribe's 100-acre reservation in trust and providing economic development funds to the Tribe. H.R. REP. NO. 36, 100th Cong., 1st Sess. 2 (1987). Furthermore, the Tiwa Indians Act expressly recognized that the Tiwa Indians were "subject to all obligations and duties [as] citizens under the laws of the [s]tate of Texas." *See* Tiwa Indians Act.

In 1983, however, Texas became concerned that its trust relationship with the Tribe violated State constitutional law. H.R. REP. NO. 36, at 2. Consequently, the United States and the Tribe began the process of granting the Tribe federal trust status. In December 1985, The House of Representatives of the 99th Congress passed H.R. 1344, a bill to restore the trust relationship between the United States and the Tribe. With regard to gaming activities, § 107 of H.R. 1344 provided:

> Gaming, lottery or bingo on the tribe's reservation and on tribal lands shall only be conducted pursuant to a tribal ordinance or law approved by the Secretary of the Interior. Until amended as provided below, the tribal gaming laws, regulations and licensing requirements shall be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo.

131 Cong. Rec. H12012 (daily ed. Dec. 16, 1985) (text of H.R. 1344 as passed by the House). Notwithstanding § 107, various state officials and members of Texas' congressional delegation still were concerned that H.R. 1344 did not provide adequate protection against high stakes gaming operations on the Tribe's reservation. Believing that restoration of their federal trust status was more important than exercising the option to operate gaming operations, the Tribe approved Resolution No. TC-02-86 in March 1986. The resolution represented a political accommodation between the Tribe, the state of

Texas, and various members of Texas' congressional delegation. The Tribe clearly viewed the applicability of state gaming laws on its reservation as an infringement on its sovereignty. But to ensure passage of the restoration legislation, the Tribe urged Congress to adopt "language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." The distinction between the language in § 107, as passed by the House, and the Tribe's suggested language is that § 107 provided the Tribe with the option to deviate from Texas' gaming laws if the Tribe petitioned the secretary of Interior, the secretary approved, and Congress did not overrule the secretary. The Tribe's suggested language, on the other hand, established that Texas law with regard to gaming would effectively operate as surrogate federal law. The resolution also clearly indicates that the Tribe, at the time of the resolution's adoption, "ha[d] no interest in conducting high stakes bingo or other gambling operations on its reservation" and "remain[ed) firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation."

The Senate of the 99th Congress incorporated the Tribe's suggested language. Section 107 of H.R. 1344, as passed by the Senate in September 1986, provided that "[g]aming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is hereby prohibited on the tribe's reservation and on tribal lands." 132 CONG. REC. S13634(daily ed. Sept. 25,1986) (text of H.R. 1344 as passed by the Senate). Shortly thereafter, however, the Senate vitiated action on H.R. 1344, *see* 132 CONG. REC. S13735 (daily ed. Sept. 25, 1986), whereupon the bill died.

The reservation legislation was reintroduced as H.R. 318 in the 100th Congress, and the House passed the bill in April 1987. Section 107 of H.R. 318 provided that, "[p]ursuant to Tribal Resolution T.C.-02-86 which was approved and certified on March 12, 1986, all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal land." 133 CONG. REC, H2051 (daily ed. April 21, 1987) (text of H.R.318 as passed by the House), The Senate approved H.R. 318 in July 1987. The Senate amended § 107 to read:

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12,1986.

133 CONG. REC. S10568 (daily ed. July 23, 1987) (text of H.R. 318 as passed by the Senate). According to the Senate Report accompanying the legislation, the only difference between § 107 as passed by the Senate and § 107 as passed by the House was that the Senate version "expand[s] on the House version to provide that anyone who violates the federal ban on gaming contained in [§ 107) will be subject to the same civil and criminal penalties that are provided under Texas law." S. REP. NO. 90, 100th Cong., 1st Sess. 8-9 (1987). Otherwise, the report stated, the "central purpose" of the two versions was the same: "to ban gaming on the reservations as a matter of federal law." *Id.* at 8. The House concurred in the Senate's amendments in August 1987, *see* 133 CONG. REC.

> H6972 (daily ed. Aug. 3,1987), whereupon H.R. 318 became public law 100-89. Section 107 of the Restoration Act is now codified at 25 U.S.C. § 1300g-6.

Ysteta 1, 36 F.3d at 1327-29 (footnotes omitted).

It may help to amplify a bit upon this legislative history. As noted in *Ysleta I*, supra, when H.R. 1344 was first introduced, it did not contain a gaming provision. However, the State's Comptroller of Public Accounts objected, and, as passed by the House, the bill contained the § 107 provision which is quoted and discussed by the Fifth Circuit opinion above. However, as recounted *in Ysleta 1*, the first § 107 did not allay the State's concern over the possibility of high-stakes gambling occurring on the reservation. The Texas Comptroller of Public Accounts requested that the Senate Select Committee replace § 107 with the following language:

> All forms of gaming, gambling, betting, lottery and bingo on the reservation of the tribe or on any land acquired after the date of the enactment of this tide and added to the reservation or held in trust status for the tribe is hereby prohibited. For the purpose of this section, the terms "gaming", "gambling", "betting", "lottery", and "bingo" shall have the meaning given those terms under the laws and administrative regulations of the State of Texas.

See Defendants' Motion, Ex. C. As discussed in *Ysleta 1,* the Tribe, concerned that federal trust status might not be approved amidst the gambling controversy, adopted Tribal Resolution No. T.C.-02-86 in March of 1986. At that time, the tribe was not engaged in gaming activities. The full resolution reads:

> WHEREAS, on December 16, 1985, the United States House of Representatives passed H.R. 1344, a bill to provide for the restoration of the federal trust relationship to the Ysleta del Sur Pueblo (Tigua Indian Tribe of Texas), and H.R. 1344 is now before the United States Senate for consideration; and,

WHEREAS, after hearings on H.R. 1344 before the House Committee on Interior and Insular Affairs on October 17, 1985, the Comptroller of Public Accounts for the State of Texas raised concerns that H.R. 1344 would permit the Tribe to conduct high stakes gambling and bingo operations to the detriment of existing charitable bingo operations in the State of Texas; and,

WHEREAS, the Comptroller urged members of the Texas Congressional Delegation to defeat H.R.1344 unless the bill was amended to provide for direct application of state laws governing gaming and bingo on the reservation; and,

WHEREAS, the Ysleta del Sur Pueblo has no interest in conducting high stakes bingo or other gambling operations on its reservation, regardless of whether such activities would be governed by tribal law, state law or federal law, and,

WHEREAS, in response to the concerns voiced by the Comptroller and other officials, the Tribe attempted to insure that H.R. 1344 would give the Tribe no competitive advantage in gaming operations by agreeing to amend H.R. 1344 to provide that any gaming activities on the reservation would be conducted pursuant to tribal law that would be required to be identical to state law, and H.R. 1344 was so amended by the House Interior committee; and,

WHEREAS, some state officials and members of the Texas congressional delegation continue to express concern that H.R. 1344, as amended, does not provide adequate protection against high stakes gaming operations on the reservation; and,

WHEREAS, the proposal that H.R. 1344 be amended to make state gaming law applicable on the reservation continues to be wholly unsatisfactory to the Tribe in that it represents a substantial infringement upon the Tribes'

power of self government, is inconsistent with the central purposes of restoration of the federal trust relationship, and would set a potentially dangerous precedent for other tribes who desire to operate gaming facilities and are presently resisting attempts by State to apply their law to reservation gaming activities; and,

WHEREAS, the Ysleta del Sur Pueblo remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation; and,

WHEREAS, although the Tribe, as a matter of principle, sees no justification for singling out the Texas Tribes for treatment different than that accorded other Tribes in this country, the Tribe strongly believes that the controversy over gaming must not be permitted to jeopardize this important legislation, the purpose of which is to ensure the Tribe's survival, protect the Tribe's ancestral homelands and provide the Tribe with additional tools to become economically and socially self- sufficient;

NOW, THEREFORE, BE IT RESOLVED, that the Ysleta del Sur Pueblo respectfully requests its representatives in the United States [Senate] and House of Representatives to amend [§ 107(a) of the Restoration Act] by striking all of that section as passed by the House of Representatives and substituting in its place language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land.

Ysleta I, 36 F.3d at 1328, n. 2. Both Plaintiff and Defendants emphasize the language of the resolution which shows that, while the Tribe viewed a statute restricting gaming activities on its land as an interference with its sovereignty, it nonetheless consented to such language in an effort to ensure federal trust status. The Senate therefore amended § 107 to include the

provision: "Gaming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is hereby prohibited on the tribe's reservation and on tribal lands."

However, that bill died, and the issue was not taken up again until the next Congress, the 100th. When the 100th Congress took up the bill again, this time titled H.R. 318, the House Committee amended § 107 to state that: "Pursuant to Tribal Regulation No. T.C.-02-86 which was approved and certified on March 12, 1986, all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal lands." This bill was referred to the Senate Select Committee of Indian Affairs, which ordered H.R.318 to be reported favorably, but not before substituting a new version of the § 107 ban. That new version, as it is now codified, reads:

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the Tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

25 U.S.C. § 1300g-6(a). The Committee report submitted with the bill to the full Senate explained its actions regarding the gaming provisions:

> The Committee recommends an amendment in the nature of a substitute. The amendments are in response to concerns raised by the State of Texas and Senators Gramm and Bentsen of Texas. In addition, the tribes have requested amendments to the bill to remove those concerns. Staff has worked closely with the Department of Interior and with the tribes which have resulted in a number of amendments, most of which are technical,

clarifying, or conforming in nature; however, three of the amendments are substantial and merit explanation. Those three substantive amendments are explained in the "Explanation of Amendments" section which follows.

* * *

Sections 107 and 207 are stricken and new sections 107 and 207 are inserted. However, the central purpose of these two sections—to ban gaming on the reservations as a matter of federal law—remains unchanged. Both tribes, by formal tribal resolution, requested that this legislation incorporate their existing law and custom that forbids gambling. The Committee's amendments simply expand on the House version to provide that anyone who violates the federal ban on gaming contained in Sections 107 and 207 will be subject to the same civil and criminal penalties that are provided under Texas law. New subsection 107(b) and 207(b) were added to make it clear that Congress does not intend, by banning gaming and adopting state penalties as federal penalties, to in any way grant civil or criminal regulatory jurisdiction to the State of Texas. New subsections 107(c) and 207(c) grant to the federal courts exclusive jurisdiction over offenses committed in violation of the federal gaming ban and make it clear that the State of Texas may seek injunctive relief in federal courts to enforce the gaming ban.

* * *

Section 107. This section provides that gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is prohibited on the tribe's reservation and on tribal lands. The provisions of Section 107 are also applicable to any lands acquired after the date of enactment of the Act and without regard to whether such lands are located within or outside of El Paso and

> Hudspeth Counties, Texas, if they are taken into trust by the Secretary and made part of the tribe's reservation. The prohibition contained in this section will also apply to any lands outside the reservation which might be acquired by the tribe or a member thereof and be taken into trust. With regard to tribal lands not taken into trust and therefore not made a part of the tribe's reservation, the laws and administrative regulations of the State of Texas related to gaming, gambling, lottery or bingo shall be applicable. This section also provides penalties for violations of these provisions which are the same as the penalties provided by Texas law. . . .

See Defendants' Ex.

The Senate passed H.R. 318 with the new § 107 on July 23, 1987, and the House passed the same on August 3, 1987. On the same date (August 3, 1987) Representative Morris K. Udall articulated his personal understanding of the new Senate Amendments with regard to the gaming provisions of the bill:

> H.R. 318 passed the House. It was sent back from the Senate with an amendment in the nature of a substitute. The bill as amended is supported by the administration.
>
> The Senate amendment makes changes to sections 107 and 207 of the bill. These sections deal with the regulation of gaming on the respective reservations of the two tribes. It is my understanding that the Senate amendments to these sections are in line with the rational [sic] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for these tribes the Court's opinion in the case.

133 Cong. Rec. H6975 (daily ed. August 3, 1987).[6]

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[6] On February 25, 1987, during deliberations over the Restoration Act, the United States Supreme Court decided *California v. Cobazon Band of Mission*

Indians, 480 U.S. 202 (1987). This Court borrows from *Ysleta I's* thorough description of that case and the Congressional reaction thereto:

> In that case, two Indian tribes located in California were sponsoring unregulated gaming activities on their reservations. The state of California attempted to enforce against the tribes a state statute regulating bingo operations. The tribes sued, asserting that California had no authority to enforce its gambling laws and regulations on tribal reservations because the United States, which has plenary power over Indian affairs, had not authorized California to do so. California argued that pursuant to Public Law 280 of 1953, the United States had expressly authorized California to enforce its bingo statute against the tribes. Public Law 280 specifically granted California authority to (1) enforce its criminal laws on Indian reservations, and (2) hear in its courts civil causes of action in which an Indian is a party. California argued in *Cabazon* Band that its bingo statute was a criminal law which could be enforced on Indian reservations.
>
> The Supreme Court disagreed. The Court began by noting that, while Public Law 280 broadened California's authority with regard to Indian reservations, Congress did not intend to grant it general civil regulatory authority. Public Law 280, the Court reasoned, was narrowly tailored to combat lawlessness on reservations and not "to effect total assimilation of Indian tribes into mainstream American society." *Cabazon Band*, 480 U.S. at 207-08,107 S. Ct. at 1087. Thus, according to the Court, when a state invokes Public Law 280 to enforce its laws, it must be determined whether the law is "criminal" in nature, and therefore applicable, or "civil" in nature, and therefore inapplicable except when the law is relevant to private civil litigation in state court. The question of whether a law is criminal or civil, in turn, depends on the law's practical effect. That is, a state law is criminal, and thus applicable under Public Law 280, if it generally prohibits certain conduct, but a state law is civil, and presumptively inapplicable, if it regulates the conduct at issue. *Cabazon Band*, 480 U.S. at 209-10,107 S. Ct. at 1088. Applying the criminal-prohibitory/civil-regulatory dichotomy, the Court rejected California's claim that its bingo statute was criminal in nature on the basis that the statute is not a general prohibition on certain conduct. Instead, "the state law generally permits the conduct at issue, subject to regulation." *Id.* at 209 107 S.Ct. at 1088. The Court analogized California's bingo statute to the state's other gambling statutes, all of which regulate (rather than prohibit) the relevant conduct. The Court concluded that,

The Defendants argue that the final amendments to § 107 of H.R. 318 along with Representative Udall's statements,[7] establish that the Act, as passed into law, completely eliminated the outright ban on gaming which was a part of all of its previous drafts. The Defendants contend that there is no longer a total ban on all gaming on the reservation, but, instead there is

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> given the extent to which the state currently regulated gambling, California had no public policy against bingo in particular or gambling in general. *Id.* at 211, 107 S. Ct. at 1089. California therefore could not prohibit the tribes from offering the gaming activities on their reservations.
>
> *Cabazon Band* led to an explosion in unregulated gaining on Indian reservations located in states that, like California, did not prohibit gaming. While Congress recognized that the growth in gaming generated substantial revenues for the tribes and, hence, fostered tribal autonomy, it nonetheless became concerned that unregulated growth might invite criminal elements. In 1988, Congress therefore enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21. IGRA was intended to balance the right of tribes to self-government with the need "to protect both the tribes and the gaming public from unscrupulous persons." See *generally* S. REP. NO. 446, 100th Cong., 2d Sess. 1-3 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3071-73.

Ysteta I, 36 F.3d at 1329-30 (footnotes omitted).

[7] At oral argument, Defendants contended that, even if the Court is unpersuaded that Representative Udall's statement is an accurate reflection of what change in the law was intended by Congress to accomplish, it is certainly evidence that a change occurred, whatever its purpose. The Court agrees. It is true that the Senate Committee reports indicate that no substantive change was intended and *Ysleta I* appears to agree with that conclusion. However, both parties now agree that the change was substantive, as both agree that the ban in the enacted version of the Restoration Act is not absolute, something the Senate Committee report did not mention when it described Section 107 as banning "gambling, lottery, or bingo as defined by the laws and administrative regulations of the State of Texas." *See Supra.* Whether or not the parties and this court now agree that the Amendment constituted a significant change, the question remains: Did the Fifth Circuit in *Ysleta I* agree, or did it view the final change in the wording of Section 7(a) as making no change in the intent or effect of the section? See discussion, *infra.*

only a ban on those "gaming activities" which are prohibited under the law of Texas.

The Defendants earlier in the history of this case urged the Court to undertake a *Cabazon*-style analysis, of the statute centering on two questions of statutory interpretation: First the meaning of the term "gaming activities," and, second, the meaning of the phrase "prohibited by the laws of the State of Texas.

However, these arguments concerning the regulatory/ prohibitory dichotomy in a manner akin to *Cabazon*, have been foreclosed by the Fifth Circuit's opinion in *Ysleta* I:

> The Tribe insists that, under either IGRA or the Restoration Act, the analysis for determining whether the Tribe's proposed gaming activities are allowed is the same. Specifically, it insists that § 107(a) of the Restoration Act does not operate as an independent bar to its proposed gaming activities because Texas does not "prohibit" the proposed gaming activities. The first sentence of § 107(a) of the Restoration Act provides: "All gaming activities which are prohibited by the laws of the State of Texas are prohibited on the reservation and on lands of the tnbe." 25 U.S.C. § 1300g-6. The Tribe maintains that the term "prohibit" has special significance in federal Indian law, which is derived from *Cabazon Band,* and whether a federal court is interpreting IGRA or the Restoration Act, it should apply the same analysis, i.e., the *Cabazon Band* criminal-prohibitory/civil-regulatory dichotomy. Thus, according to the Tribe, the critical question under either IGRA or the Restoration Act is whether Texas law and public policy "prohibit" (that is, criminalize rather than regulate) the proposed gaming activities.
>
> The Tribe argues that Texas does not prohibit the Tribe's proposed gaming activities by pointing to the State's broad definition of a lottery: "'Lottery' means the

procedures operated by the state under this chapter through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize." TEX. GOV'T CODE ANN. § 466.002(3) (Vernon Supp. 1994). The Tribe contends that its proposed gaming activities fall within the State's definition of lottery. That is, like a lottery, the Tribe's proposed gaming activities (i.e., baccarat, blackjack, craps, roulette and slot machines) are all games of prize, chance and 'consideration. Because the State permits one type of game where the elements are prize, chance and consideration, the State no longer prohibits any other games with the same elements. The State, instead, merely regulates them. Consequently, according to the Tribe, § 107(a) of the Restoration Act does not act as an independent bar to the Tribe's proposed gaming activities.

The Tribe's argument is appealing only because § 107(a) of the Restoration Act uses the word "prohibit." But our analysis of the legislative history of both the Restoration Act and IGRA leads us to a conclusion contrary to that sought by the Tribe. When it passed IGRA, Congress indicated that, when determining whether Class III games are "prohibited" in certain states, federal courts should rely on *Cabazon Band's* criminal-prohibitory/civil- regulatory distinction. No such express recognition of *Cabazon Band* appears in the committee reports accompanying the Restoration Act. Rather, in considering the Restoration Act, Congress clearly was concerned with enacting the compromise between the Tribe, the State and various members of the Texas congressional delegation. Congress specifically drafted § 107(a) "in accordance with the tribe's request in tribal Resolution No. T.C.-02-86." 25 U.S.C. 1300g-6(a). That resolution is crystal clear, the Tribe, in response to the

concerns of Texas officials and various members of the State's congressional delegation, petitioned Congress to adopt "language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." Congress acquiesced, and in so doing, spelled out the purpose of § 107(a): "[t]his section provides that gambling, lottery or bingo *as defined by the laws and administrative regulations of the State of Texas is prohibited on the tribe's reservation and on tribal lands.*" S. REP. NO. 90 at 10 (emphasis added). The report's reference to both the laws and administrative regulations of Texas is clearly inconsistent with a contention that the Tribe and Congress contemplated that the prohibitory-regulatory distinction of *Cabazon Band* would be involved in analyzing the Restoration Act. Furthermore, as a means of enforcing those laws and regulations, Congress provided in § 107(a) that "[a]ny violation of the prohibition provided in this subsection shall be subject to the *same civil and criminal penalties that are provided by the laws of the State of Texas*." 25 U.S.C. § 1300g-6(a) (emphasis added). Again, if Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a civil penalty? We thus conclude that Congress did not enact the Restoration Act with an eye towards *Cabazon Band* Congress was merely acceding to the Tribe's request that the tribal resolution be codified. See S. REP. NO. 90 at 8 (the Tribe, "by formal resolution requested that this legislation incorporate [its] existing law and custom that forbids gambling").

The Tribe points to two items in the Restoration Act's legislative history that it believes indicates Congress incorporated *Cabazon Band* into § 107(a) of the Act, First, Congress noted in its report that § 107(b) "is a restatement

of the law as provided in [Public Law 280]." *Id.* at 10. The reference to Public Law 280, the statute at issue in *Cabazon Band*, presumably is the hook on which the Tribe hangs this argument. The Tribe's argument, however, misses the mark, because § 107(b), as opposed to § 107(a), states only that the Restoration Act is not to be construed as a grant of civil or criminal regulatory jurisdiction to the State. In that sense only, § 107(b) is a restatement of Public Law 280. But it is § 107(a) that determines whether Texas "prohibits" certain gaming activities, and § 107(a) is not a restatement of Public Law 280.

The Tribe's second argument admittedly raises a closer question. In August 1987, as the Restoration Act was on the brink of final passage in the House of Representatives, a member made the following statement on the floor of the House:

> It is my understanding that the Senate amendments to [§ 107] are in line with the rational [sic] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for [the Tribe] the holding and rational [sic] adopted in the Court's opinion in the case.

133 CONG. REC. H6975 (daily ed. Aug. 3, 1987) (statement of Rep. Udall). Standing alone, this statement supports the Tribe's argument that Congress intended to incorporate *Cabazon Band* into the Restoration Act. But we find ourselves confronted with substantial legislative history to the contrary, including the plain language of § 107(a), its accompanying report language, and the tribal resolution to which § 107(a) expressly refers. We cannot set aside this wealth of legislative history simply to give meaning to the floor statement of just one representative that was recited at the twelfth hour of the bill's consideration. *See, e.g., Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 648-50, 110 S. Ct.

2043, 2047-48, 109 L. Ed. 2d 659 (1990). Rather, upon reviewing these materials, we are left with the unmistakable conclusion that Congress—and the Tribe—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas.

* * *

The tribe warns that our conclusion (i.e., that Texas gambling laws and regulations are surrogate federal law) will constitute a substantial threat to its sovereignty in that "[e]very time the State modifies its gambling laws, the impact will be felt on the reservation." However, any threat to tribal sovereignty is of the Tribe's own making. The Tribe noted in its resolution that it viewed § 107(a) of the Restoration Act as "a substantial infringement upon the Tribes' [sic] power of self government" but nonetheless concluded that relinquishment of that power was necessary to secure passage of the Act. To borrow IGRA terminology, the Tribe has already made its "compact" with the state of Texas, and the Restoration Act embodies that compact. If the Ysleta del Sur pueblo wishes to vitiate the compact it made to secure passage of the Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA.

Ysleta I, 36 F.3d at 1332-34, 1335.[8]

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[8]It is not so clear to the Court how far the Fifth Circuit interpreted the Restoration Act's ban on gaming to stretch. *Ysleta I* certainly found that the Act's Section 107 was a codification of the Tribe's resolution and promise as recorded in T-C-02-86. That promise made the ban absolute, regardless of the legality of the practice in Texas: "all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." *See Ysleta I*, 36 F.3d at ___. However, the Fifth Circuit also seemed to recognize the possibility that the scope of the ban might change with alterations in Texas law, when it recognized the Tribe's warning that, "'[e]very time the State

The State, likewise, does not in this proceeding urge the Court to read *Ysleta I* as interpreting the Restoration Act to be a complete ban on all gaming on the Reservation. Note the following language from Motion for Summary Judgment:

> Additionally, the State does not, as the tribe contends, bottom its case on a view that the Restoration Act bans all gaming. The plain language of the Restoration Act is the beginning and the end of the State's theory: "All gaming activities which are prohibited by the laws of Texas are prohibited on the reservation and on lands of the tribe." 25 U.S.C. § 1300g-6(a). If the tribe qualifies for a gambling activity not prohibited to it by Texas law, then, of course the tribe may pursue that activity within the confines and limits of the law. At this point, however, it is undisputed that the tribe is not running nonprofit or charity gaming, it is not the State of Texas, its prizes are cash that far exceed $5 or $25, the tribe lacks a license from the Texas Racing Commission, and it is a commercial casino operator, generating millions in annual revenues. *See* Plaintiff's Reply to Defendants' Response to Motion for Summary Judgment, p.2.

So the State and Defendants agree that only gaming which is prohibited by Texas law is prohibited to the Tribe.[9]

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modifies its gambling laws, the impact will be felt on the reservation.'" *Id.* at 1335. Arguably Texas could change its definitions of "gaming, gambling, lottery or bingo," or it could change the gaming or gambling activities it chose to *prohibit*. *Ysleta I* leaves this an open question.

[9] Note the following statement of counsel for the State during the August 22, 2001, oral arguments:

> MR. CRAWFORD (For the State of Texas): So what the change in the language for the Restoration Act did, if anything, from being defined by the laws of the State of Texas to being prohibited by Texas, it would actually give the tribe the ability to engage in charitable raffling or charitable bingo or any of the things that other people can if they met the criteria set out under Texas statutes. So, under that reading, which

The State urges the Court to accept a reading of the Restoration Act which would treat the Tribe as any other citizen of Texas. What a citizen of Texas can do, the Tribe can do. But what a citizen of Texas cannot do, the Tribe cannot do. The State argues that when the Restoration Act was passed, it waived any sovereign status claim the Tribe might have regarding gaming, with the full knowledge and consent of the Tribe. The State contends that during the passage of the Restoration Act, the Tribe through its Resolution, agreed to be subjected to the gaming laws of Texas just as any other citizen in exchange for federal trust status.

The Tribe argues that it is not just any other citizen, but a sovereign nation, and the Restoration Act did not change that status, even with regard to gaming.

The Defendants agree that *Ysleta I* makes clear that Congress did not enact the Restoration Act with an eye towards *Cabazon.*[10] However, they argue that the court did not

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> we argue is the correct reading, they're treated no differently than any other citizen of the State of Texas, no different from Julie Parsley or Joe Crawford or anyone else who wanted to go out and operate a slot machine or keno table or whatever it was that we were going to be doing, we are prohibited by law from doing it, and the tribe is prohibited by law from doing it.

Tr. Hearing on Summary Judgment Motions, Pages 36-37.

The "as defined" versus "which are prohibited" difference could have been significant because if Texas law "defined" certain gaming or gambling activities but then legalized same (i.e., did not "prohibit" such activities) then the prior version of § 107(a) would have prevented the Tribe from engaging in such activities on its reservation even though everyone else in Texas could engage in those activities. However, under Texas Law as presently written, interpreted and applied, the differences in terminology do not affect the outcome. *See, infra.*

[10]Although the Defendants disclaim reliance on the *Cabazon* rationale, their arguments in this case relating to the interpretation of the word "prohibit" clearly echo the same or similar theory. Their plea for a strange and unnatural interpretation of the language of the Restoration Act ultimately

delineate the scope of the Restoration Act's prohibition on gaming in its decision. In addition, the Defendants contend that nothing said by the Circuit Court panel regarding the Restoration Act's gaming clause has a preclusive effect on this Court's decision, as the discussion was not necessary to support its decision and is therefore merely dicta.

As for the Defendants' first argument, the Court disagrees that *Ysleta I* did not delineate the Restoration Act's prohibition on gaming. What it did not do, as the Defendants' had sought (and seek again here), was to engage in a game by game analysis of what is, and is not, prohibited under Texas law. The Fifth Circuit did not do that because it determined that the Restoration

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is justified on the basis of the Pueblo's unusual status as a "sovereign" Indian Tribe. The Tribe simply wants to be treated differently from others. But the State says that the Tribe gave up the right to be treated differently from others when it gave up any sovereign immunity it may have possessed with respect to gaming and gambling in exchange for federal trust status. And, as pointed out by the State at page 4 of its Reply in Support of its Motion for Summary Judgment, this particular limitation on the Tribe's sovereignty is not inconsistent with other federal laws dealing with similar issues:

> It also bears emphasis that the tribe's urged meaning for the Restoration Act makes no sense in the context of other statutes addressing tribal gambling. With 18 U.S.C. § 1166, Congress criminalized all gambling on reservations that is against state law and not permitted under the IGRA. Through the Johnson Act, 15 U.S.C. § 1175, it outlawed the manufacture, possession, or use of gambling devices, and in the Organized Crime Control Act, 18 U.S.C. § 1955, it prohibited for profit gambling businesses that are illegal under state law. With the IGRA, Congress established a detailed scheme of oversight and coordination with state governments to permit gambling on some Indian reservations. *See* 25 U.S.C. §2701 *et seq;* 25 C.F.R. § 500 *et seq*. The tribe's interpretation of "prohibited" is not in keeping with these strict limitations, oversight, and criminalization in the field of Indian gaming. It defies common sense to believe that this particular tribe may operate with no controls or limitations, while other tribes are governed by the limitations and procedures of the IGRA and the regulations of its implementing agency, the National Indian Gaming Commission.

Act's prohibition was drafted specifically in accordance with the Tribe's wishes as detailed in Tribal Resolution No. T.C.-02-86, and that that resolution petitioned Congress to adopt language which would prohibit "*all* gaming, gambling, lottery, or bingo as defined by the laws and administrative regulations of the State of Texas. . . ." *See Ysleta 1*, 36 F.3d at 1333 (emphasis added). *Ysleta I* appears to have determined that § 107, as enacted, and properly interpreted, bans all gaming, Therefore, contrary to the Defendants' assertion, it can be argued that the scope of the Act's prohibition as articulated in *Ysleta I* was to encompass *all gaming activity* as "defined" by the laws and regulations of the State of Texas, whether "prohibited" or not. This interpretation would be consistent with the Senate Report explaining the "substantive" changes occasioned by the amendatory language and also with the language in *Ysleta I* just quoted above.

Likewise, the Court disagrees with the Defendants' contention that *Ysleta I's* lengthy discussion of the Restoration Act's ban on gaming was merely dicta. The question before the court was: Which statutory scheme, IGRA or the Restoration Act governed the Tribe's casino operation? And, to resolve that question, the Fifth Circuit had to first determine the effect of the Restoration Act's § 107. Only after determining § 107's effect could it then decide whether the Restoration Act and IGRA had an actual conflict. Once the court found conflict it was forced to decide which statute to apply, and, in so doing, concluded that the Restoration Act, as the specific statute, was applicable. *See Ysleta 1*, 36 F.3d at 1332-33. Only after it decided that the Restoration Act applied could the court decide whether the Act had waived the State's sovereign immunity. If the court had determined that IGRA applied, or that the Restoration Act and IGRA followed the same basic statutory scheme regarding gaming, the result of the case would have been different. So the initial determination regarding the breadth of the Restoration Act's provisions on gaming was a necessary step toward the Court's final decision. And that determination being necessary,

it cannot be dicta. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) (holding that "it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

Further, this Court agrees, as held in *Ysleta I*, that the Restoration Act, and not IGRA, controls the outcome of this case.[11]

Defendants have conceded that if the final change in the wording of § 107 had not been made, i.e., if § 107 as enacted contained the earlier language, to-wit: "Gaming, gambling, lottery or bingo as defined by the laws and regulations of the State of Texas is hereby prohibited on the Tribe's reservation and on tribal lands," then, and in that event, they cannot prevail. However, both of the parties, and this Court, agree that the amendatory language did significantly, if not substantially, change the statute, although this Court is convinced, as the

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[11] However, IGRA's presence in general Indian Law, and the Fifth Circuit's analysis of the Restoration Act, further undermines the Defendants' position. For the only way for the Defendants to fully win, *i.e.*, to be permitted to maintain and operate its Casino as it presently does, is for this Court to find in the Restoration Act a specific *grant* of gaming privileges to the Tribe and that said grant trumps the IGRA provisions regarding Class III gaming, Stated otherwise, it would not be enough for the Court to conclude only that the Restoration Act does not bar the Tribe's gaming activities. The Court would also have to conclude that because of the Restoration Act, the provisions of IGRA cannot be enforced against the Tribe.

To illustrate, one need only ask what if *no* gaming provision had been included in the Restoration Act? Then, most assuredly, IGRA would apply. In *Ysleta I*, the Fifth Circuit concluded that the specific statute (the Restoration Act) controlled over the general (IGRA) on the gaming issue. So, if there were no specific statute, then IGRA would provide the only means by which the Tribe could operate its Casino, i.e., through IGRA's tribal-state compact provisions. Even if the Court agreed that *Ysleta I* did not delineate the scope of § 107's ban, or that it only discussed § 107 in dicta, it cannot reasonably be argued that the Fifth Circuit read § 107 as a grant of gaming authority to the Tribe. See discussion below.

legislative history and *Ysleta I* strongly indicates, that Congress did not intend any change. This Court's own view of proper statutory construction does not permit reliance upon legislative history to change the meaning of the language used in the statute, where the language used is clear and unambigious, as it is in § 107 as enacted. But the question is: does the Fifth Circuit's opinion adopt a different view of statutory construction thereby concluding that all gaming as defined by Texas law is prohibited on the reservation. If so, we should stop here. The court acknowledges its uncertainty as to the correct resolution of this issue. Prudence indicates, therefore, that it should go forward.

So, assuming that *Ysleta I* does not foreclose such analysis, the Court will now deal with the remaining issues as presently argued by the parties.

Applicability of the Texas Penal Code to the Pueblo

The Defendants contend that the Texas Penal Code by its own terminology does not apply to it. They argue that the Tribe is not a "person" under Code definitions but, rather, a "dependent sovereign nation." Section 1.07(38) of that Code defines "person" as an "individual, corporation or association." Section 1.07(6) defines an "association" as "a government or governmental subdivision or agency, trust, partnership or two or more persons having a joint or common economic interest." The Tribe as a group of "two or more persons" clearly has a "joint and common economic interest" under the facts of this case. The Tribe is engaged in the casino gambling enterprise for profit, receiving millions of dollars in revenues each year. This interpretation of "association" is reinforced by § 1.05 of the Penal Code which provides that "the rule that a penal statute is to be strictly construed does not apply to this Code. The provisions of this Code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the statute." Courts and the United States

Congress have frequently referred to tribes as "associations." *See, e.g., Blue Legs v. U.S.B.I.A.*, 867 F.3d 1094 (8th Cir. 1989) wherein it is stated that "over the course of the last two centuries Indian tribes have evolved into dependent associations with limited powers of self-government." It is clear to the Court from a reading of the Texas Penal Code that it intended to embrace within the term "person" any entity that was capable of violating the provisions of that Code. The Court further agrees with the State that while the Code's definition of the word "person" is clear, as just indicated, it is also inconsequential since the Restoration Act itself imposes state law as surrogate federal law on the Defendant Tribe as a matter of law.

The Defendants need to understand also that the Restoration Act's prohibition reaches beyond the Tribe and the other named Defendants. It states that "all gaming activities which are prohibited by the laws of the State of Texas are prohibited *on the reservation and on lands of the Tribe.*" That language covers *all persons* who patronize the casino and engage in its gambling activities as well as the Defendants who own the facilities and administer, manage and regulate the casino's gambling activities. And, of course, the patrons are "persons" within the meaning of the Penal Code. Finally, this being a civil action to enforce civil remedies under the Restoration Act, the Court is not limited by the definitions in the Penal Code. So the next question is: do the provisions of the Texas Penal Code prohibit the gambling activities that are being conducted by the Defendants on the Tribe's reservation land?

The State would answer, "yes" because it believes that the effect of the Restoration Act is to treat the Tribe as any other citizen of Texas. Again, what a citizen of Texas can do, the Tribe can do. But what a citizen of Texas cannot do, the Tribe cannot do.

The Tribe, while it agrees that Texas law would not permit any Texas citizen to do what its casino is doing, nevertheless, contends that it is not just any other citizen but, rather, a

sovereign nation, and that this prevents it from being treated as any other citizen of Texas under the provisions of the Restoration Act.[12] Rather, it argues that it should be treated as

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[12] Again, note the colloquy between the court and the Defendants' attorney during the Court's first conference on the case in July 2001:

> THE COURT: Are you contending that the language of the State Lottery Act would permit a citizen, any citizen in the State of Texas, on their own lands to conduct an operation such as you are conducting because of the breadth of its language?
>
> MR. GORDON: No, sir. We are contending the State lottery Act allows the State of Texas to conduct any activities, including any activities a tribe may be operating at its casino under the lottery act. And we are contending that those activities are, by virtue of the constitutional amendment and the lottery act, permitted to the State of Texas.
>
> THE COURT: Since they are permitted to the State of Texas, then how does that work that they are permitted to the Tribe?
>
> MR. GORDON: It opens up the whole gamut of gaming to the state. We believe its permitted to the state, it is permitted to the tribe.
>
> THE COURT: In other words, your focus is on the state's rights. In other words, if the state has the authority to do it, then it's in your view not, quote, prohibited, unquote.
>
> MR. GORDON: Yes. That is certainly true.

To the same effect note the Defendants' statement at page 2 of its Opposition to Plaintiff's Motion for Summary Judgment:

> "The State's entire approach and argument relies on the misplaced assumption that the Pueblo, a dependent political community, possessing attributes of sovereignty, is no different than a corporation or fraternal association. Proper recognition of the nature and status of the Pueblo requires denial of the State's Motion."

But the State does not deny that the Pueblo as an Indian Tribe possesses certain attributes of sovereignty. What it does deny is that the Pueblo possesses any attribute of sovereignty *with respect to gaming an gambling activities.* As stated by Judge Hudspeth in his December 2, 1999, order, "The court finds that §1300g-6 [of the Restoration Act] does represent an unequivocal waiver of tribal immunity, and governs the sovereign immunity issue in this case." *See* p. 5 of opinion. So the State is right in its contention

the State of Texas is treated. And it points to the language of § 107(a) which states that "all gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation. . ." It argues that the laws of the State of Texas, particularly the Lottery Law, are broad enough to permit the State of Texas to engage in any and all of the gaming activities that are presently conducted by the Tribe. Here the Defendants contend that if the State of Texas itself is not prohibited under its own constitution and its own state laws from engaging in the gaming and gambling activities of the type engaged in by the .Pueblo on its reservation then the Pueblo is not prohibited from engaging in those gaming and gambling activities, and that this would be so whether or not the State actually chooses to engage in such gaming activities.

The problem for the Defendants is that, as *Ysleta I* makes clear, the Tribe waived any parallel sovereign status claim that it might have regarding gaming when it made its "compact" with the State in order to obtain federal trust status.[13]

And the Defendants are confronted by another insurmountable barrier because the Court concludes that the State cannot, under existing Texas law, lawfully engage in the gaming and gambling activities as they are conducted by the Tribe at the Speaking Rock Casino on its reservation. But, the Court goes further and concludes, as a matter of law, that even if the State's constitution and statutes did permit it, and it alone, to engage in such activities, thereby prohibiting it to others, then the Defendant Tribe, as one of those "others" could not lawfully engage in such gaming aud gambling activities. The Tribe simply does not, as regards gambling, share a parallel sovereign

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that, with regard to gaming activities, the Pueblo must be treated the same as any person, corporation or association.

[13] The Tribe disavowed in its resolution, quoted *supra*, any interest in conducting any gambling operations on its reservation and stated its "commitment to prohibit outright any gambling or bingo in any form on its reservation."

status with the State of Texas. The laws may permit the State to engage in certain gaming activities without thereby opening the door for the Tribe or any other person to engage in such activities.

The Court concludes, as a matter of law, that the fact that the State of Texas is authorized to conduct a lottery does not in any way open the door for the Defendants to engage in such a lottery or any other gaming activities.

There are certain gambling activities that private citizens and/or certain organizations, such as charities, may engage in lawfully in Texas if they comply with those State rules, regulations, and licensing requirements that pertain to such gambling activities. 'The State has acknowledged that the Tribe, if it qualified under such rules and regulations and, if it complied with those established rules and regulations, could participate in such limited gaming activities. The problem here is that the Defendant Tribe has not even attempted to qualify under the rules, regulations or licensing requirements of the State of Texas with respect to any of the gaming activities presently being conducted at the casino on its Reservation. And, since the *Cabazon* criminal and prohibitory civil-regulatory distinction does not apply under the Restoration Act with respect to gambling, the Tribe cannot engage in these "regulated" gaming activities unless it complies with the pertinent regulations.

The Court, having found and concluded that the Texas Penal code applies to the Tribe and the other Defendants, it must now determine if the summary judgment record supports the State's position that the Tribe has been, and is, violating the specific provisions of that code. The answer is a clear "Yes." Indeed, as noted above, it does not appear that the Defendants would argue that if a person, partnership, corporation or association (other than the Tribe itself) engaged in the gaming and gambling activities as they are presently engaged in by the Tribe on its reservation, then such person, partnership, corporation, or

association would be in violation of the provisions of the Penal Code. But, whether the Defendants would agree or not, the Court concludes that Defendants are operating the casino, or causing it to be operated, in violation of the Penal Code as follows.

The Court finds that the Tribe operates, *inter alia,* high-stakes bingo, keno games, a form of blackjack called Tigua 21, poker games, slot machines, crap games, a "Big-Six" wheel game, and off-track betting on horse and dog races, all as described in the State's Motion for Summary judgment under the heading "games at the Casino." Pp 10-17. And the Court notes that the summary judgment record cited therein fully supports this finding.

And the Court makes the following additional conclusions of law:

The Speaking Rock Casino and Entertainment Center is a building which has as one of its uses, the making or settling of bets, as defined by Section 47.01(3) of the Texas Penal code.

The Speaking Rock Casino and Entertainment Center is a place where, among other activities, one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, as defined by Section 47.01(7) of the Texas Penal Code.

The Speaking Rock Casino and Entertainment Center is a place where activities are conducted which include one or more of the activities described in Section 47.02(a), 47.03(a), 47.04(a), 47.05(a) and 47.06(a) of the Texas Penal Code.

The Defendants knowingly maintain the Speaking Rock Casino as a place where persons repeatedly and habitually go for purposes of gambling and that these activities are frequent and continuous.

The Defendants habitually make the Speaking Rock Casino available to members of the general public for gambling,

gambling promotion and the communication of gambling information, all of which are prohibited by law.

The Defendants operate the Speaking Rock Casino as a place where plays and bets are made upon games played with cards, dice and other gambling devises.

The Speaking Rock Casino is not a "private place" as defined by Texas Penal Code § 47.01(8), but rather is a public place to which the general public is invited and has ready access.

Remedy

So what is the appropriate remedy? Here it will be helpful to quote from Judge Hudspeth's decisions of December 3, 1999, and his follow-up opinion of January 13, 2000. First the pertinent part of Judge Hudspeth's opinion of December 3, 1999, dealing with the Defendants' Motion to Dismiss:

> This is the case that asks the question: can the State of Texas enjoin gambling activities taking place on an Indian reservation located within its borders? (Fn. 1)
>
> (Fn. 1) Certain forms of gambling are prohibited in Texas. *See* Tex. Pen. code Ann. § 47.01 et seq.; *see also* Tex const. Art. 3 § 47(a) (directing state legislature to pass anti-gaming laws).
>
> * * *
>
> The Restoration Act purported to prohibit gambling on the reservation by incorporating state law; however, the Tribe tried to compel Texas to negotiate a "Tribal-State compact" pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701 *et seq.* (1987). See *Ysleta del Sur Pueblo v. State of Texas*, 852 F. Supp. 587, 588-89 (W.D.Tex. 1993). The Tribe hoped that an IGRA compact would result in federal authorization of reservation gambling. The Fifth Circuit Court of Appeals ultimately resolved the question in favor of the State of Texas by

holding that the Restoration Act, as opposed to IGRA, would govern the gambling question were a proper suit to arise. *See Ysleta I*, 36 F.3d at 1335-36.

* * *

Having also determined that activities at Speaking Rock were in violation of the Restoration Act, the AG commenced the instant lawsuit. In their motion to dismiss, Defendants raise the following claims: (1) Congress never waived the Tribe's sovereign immunity, (2) the United States must be joined as an indispensable party before the AG can proceed, and (3) the AG lacks capacity to sue the Tribe on behalf of the State of Texas.

B. Waiver of Sovereign Immunity

Defendants first argue that nothing in the Restoration Act constitutes a waiver of the Tribe's sovereign immunity. Alternatively, Defendants argue that the question of whether Plaintiff can bring suit should be governed by Public Law 280. (Fn. 2)

(Fn. 2) Public Law 280 is codified at 18. U.S.C. § 1162(a) and 28 U.S.C. § 1360(a). *See* Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-89 (1953). Under Defendants' theory, some of the language of Public Law 280 mirrors provisions of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 *et seq.* (1968), even though the former statute applies only to certain tribes outside of Texas. Compare 28 U.S.C. § 1360 and 18 U.S.C. § 1162 with 25 U.S.C. §§ 1321-22. By contrast, ICRA applies to all federally-recognized tribes. *See* 25 U.S.C. § 1301. Hence, Defendants argue, Public Law 280 jurisprudence should apply to tribes in Texas through ICRA.

* * *

The Restoration Act provides that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." *See* 25 U.S.C. § 1300g-6(a). All civil and criminal penalties relating to illegal gambling under state law apply on the reservation, and Congress granted exclusive jurisdiction to federal courts over actions involving gaining violations on the reservation. *See* 25 U.S.C. § 1300g-6(a-c). Most importantly, the Restoration Act allows the State of Texas to bring suit in federal court to enjoin any such violations. *See Id.*

The court finds that § 1300g-6 does represent an unequivocal waiver of tribal immunity, and governs the sovereign immunity issue in this case.

* * *

In addition, the Court finds that Defendants' argument regarding Public Law 280 and the ICRA fails since Congress clearly intended to abrogate the Tribe's immunity for purposes of prohibiting gambling. The Restoration Act is an act related to specific tribes, and was passed almost twenty years after ICRA.

* * *

In addition, Public Law 280 does not apply to Texas tribes. More importantly, the Fifth Circuit Court of Appeals has made it clear that the analysis of gambling on the Tribe's reservation is to be governed exclusively by the Restoration Act. *See Ysleta I,* 36 F.3d 1325, 1332-35 (5th Cir. 1994) ("the Restoration Act . . . and not IGRA would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law.") Moreover, the Fifth Circuit implicitly repudiated Public Law 280 jurisprudence in *Ysleta 1.* (Fn. 4)

(Fn. 4.) The lower court determined that IGRA directed courts to adopt the analytical framework of the Supreme Court's ruling in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987) in assessing reservation gambling questions. See *Ysleta del Sur Pueblo*, 852 F. Supp. at 593. *Cabazon* was a Public Law 280 case. Thus, by finding that the Restoration Act, and not IGRA, governed a dispute involving the Tribe, it implicitly rejected the "*Cabazon*/Public Law 280" framework. *See Ysleta I*, 36 F.3d at 1335.

Furthermore, tribal immunity is not a defense to a claim for injunctive relief when brought against tribal officials and the Tribe itself. *See TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680-681 (5th Cir. 1999); (Fn. 5)

(Fn. 5.) The suit in *TTEA* was brought against the Tribe, two tribal judges, and the Tribal Court.

*See also San*ta Clara Pueblo, 436 U.S. at 59, 98 S. Ct. at 1677. Thus, Plaintiff has established a prima facie basis to proceed.

* * *

D. Capacity to Sue

* * *

In this case, the AG has cited no statute empowering him to sue the Defendants on behalf of the State *of* Texas, nor is any grant of authority found in the Texas Penal Code. (Fn. 12)

(Fn.. 12) *See* Tex. Pen, Code Ann. § 47.01 *et seq.; see also Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 (Tex. App.-Austin, 1996, no writ) (noting that authority to enforce Penal Code is vested exclusively in district and county attorneys, and that AG cannot initiate prosecutions.)

> The AG' s claim of authorization through this common law power must be rejected in light of the preceding discussion. Although the AG attempts to characterize § 1300g-6(c) of the restoration Act as providing him with authority to sue, such a reading would in effect transform congress into the Texas legislature.
>
> * * *
>
> The burden of proof rests with the AG to identify a source of power authorizing him to exercise this option on behalf of the state. Thus far, the AG has not met his burden.
>
> Nonetheless, given the competing policy interests in this case, and in light of the fact that dismissal is generally disfavored under the federal Rules, the court will afford the AG an opportunity to amend his complaint to properly demonstrate his source of authority, under Texas law, to bring this suit. (Fn. 13)
>
> (Fn. 13) Arguably, the AG could characterize Speaking Rock as a "common nuisance" since it appears to be "a place to which persons habitually go for the purpose of . . . gambling in violation of the Texas penal code." *See* Tex. Div. Prac. & Rem. code § 125. 001. The AG has authority to bring suit to abate or enjoin such a nuisance. *See Id.* §125.002 On their face, these statutes appear to confer the necessary authority.

Thereafter on January 13, 2000, Judge Hudspeth entered his order denying Defendants' second motion to dismiss, the pertinent part of which we now quote:

> On December 16, 1999, the AG filed a first amended complaint alleging capacity to bring suit in the name of the State of Texas to enjoin and abate a public nuisance. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 125.001-002 (Vernon's 1997) ("Civil Practice Code"). (Fn. 1)
>
> Fn.1: the statutes allow the AG to enjoin several public nuisances, including the "use of any place for . . . (1)

gambling, gambling promotion, or communicating gambling information prohibited by law[.]" *See* Tex. Civ. Prac, & Rem. Code Ann. § 125.021.

A. Application of State Law Under Restoration Act

Defendants request dismissal of this case for lack of subject matter jurisdiction or failure to state a claim on the basis that sections 125.001 and 125.002 of the civil Practice Code form part of a state regulatory scheme. Under section 107(b) of the Restoration Act, the State of Texas has no general civil or regulatory jurisdiction over the reservation; therefore, Defendants argue, the state public nuisance laws cannot apply on their reservation.

A brief review of the statutory scheme illustrates the flaw in Defendants' reasoning. Section 107(a) of the Restoration Act provides that all gambling activities prohibited under Texas law are also prohibited on the reservation. *See* 25 U.S.C. § 1300g-6(a). Thus any state gambling law becomes federal law for purposes of reservation gambling. *See Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1335(5th Cir, 1994), *cert. denied*, 514 U.S. 1016, 115 S. Ct. 1358 (1995) ("Ysleta I") ('Texas law . . . functions as surrogate federal law.") The reference in section 107(a) makes clear that "state law" encompasses both civil and criminal statutes. *See* 25 U.S.C. § 1300g-6(a). Although federal courts maintain exclusive jurisdiction over cases involving violations of 107(a), congress empowered the State of Texas to sue in federal court to enforce the civil and criminal provisions through an injunction. *See* 25 U.S.C. §1300g-6(c). (Fn. 4)

(Fn. 4) Moreover, other courts have determined that Congress is within its power in making state civil and criminal gambling laws applicable in Indian country. *See United States v. Santa Ynez Band of Chumash Mission Indians,* 983 F. Supp. 1317, 1324 (C.D. Cal.

1997) (applying 18 U.S.C. § 1166(a) which incorporates state civil gambling provisions into federal law); *United States v. E.C Investments, Inc.*, 77 F.3d 327, 331 (9th Cir. 1996) (addressing 18 U.S.C. § 1955 which does the same for criminal statutes).

The only other provision in the Restoration Act pertaining to gambling provides that [nothing in [the gambling] section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." *See* 25 U.S.C. 1300g-6(b). (Fn. 5)

(Fn. 5) Section 1300g(b) appears to have been derived from two United States Supreme Court opinions. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987); *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 96 S. Ct. 2102 (1976). Although the Supreme Court in those cases determined that Public Law 280 (18 U.S.C. §1162) did not grant to certain states general civil regulatory authority over tribal reservations, it also held that such authority could be granted where expressly provided by congress. *See Cabazon*, 480 U.S. at 214-15, 107 S. Ct. at 1091; *Bryan*, 426 U.S. at 383-85, 96 S. Ct. at 2108-09. These cases reinforce the notion that congress's grant to the State of Texas to exercise regulatory authority over gambling on the Tribe's reservation was valid. *See Cabazon*, 490 U.S. at 207, 107 S. Ct. at 1087 (discussing plenary powers of Congress over tribes).

Thus, the plain wording of sections 107(a) and (c) evince Congress's clear intent to limit the Tribe's sovereign immunity by allowing the State of Texas to enjoin reservation gambling using state anti-gaming laws. Accord *Ysleta I*, 36 F.3d 1327-29 (reviewing legislative history of Restoration Act); *Ysteta III*, 1999 WL 1211427 at 2 (rejecting sovereign immunity defense),

Undeniably, sections 125.021 and 125.022 of the Civil Practice Code are state laws pertaining to gambling. In addition, there is no issue here regarding the propriety of using an injunction to stop a criminal violation. Courts may enjoin a potential criminal violation only (1) in cases of national emergency; (2) in cases involving a public nuisance; or (3) in cases where a statute grants a court the power to enjoin a crime. *See United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 48 (1998). In this case, there is (1) a statute defining as a public nuisance an establishment where state gambling laws are violated; and (2) federal and state statutes authorizing injunctions against state gambling law infractions. Furthermore, as the Eighth Circuit Court of Appeals has made clear, federal courts should employ state remedies (and hence state injunction procedures) to enforce "surrogate" federal gambling laws against tribes. *See Id.* (determining that where Nebraska case law provided for injunctive relief against violations of state gaming laws, federal court was required to enforce "surrogate" federal statute with reference to state law remedy).

* * *

In this case, . . . the AG is only using the Civil Practice Code provisions as they pertain to gambling. Under the Restoration Act, these provisions function as federal laws; they empower the AG, as the representative of the State of Texas, to bring a suit in federal court to enjoin gambling on the reservation, *See* 28 U.S.C. §1300g-6(a) and (c). Consequently, the motion to dismiss under rules 12(b)(1) and 12(b)(6) should be denied.

B. Lack of Capacity

Defendants' newest incarnation of its lack of capacity claim is premised on the notion that both state and federal

> law must explicitly empower the AG to bring suit on behalf of the State of Texas. This argument stems from Defendants's reading of *State of Texas v. Scott & Fetzer Co.*, a case concerning whether the AG was authorized under state law to bring a parens patriae action to recover for violations of federal antitrust law. *See* 709 F.2d 1024, 1024-25 (5th Cir. 1983).
>
> * * *
>
> Defendants' contortion of *Scott & Fetzer* fails for several reasons . . . . [t]he Civil Practice Code authorizes the AG to sue anyone who runs a gambling casino within the state. Second, Defendants have cited no authority in support of the proposition that the state law allowing the AG to enjoin gambling must specifically refer to the Tribe or its reservation. The Restoration Act allows such suits, and only Congress can waive the Tribe's sovereign immunity; thus, there is no need for the State of Texas to also pass a statute authorizing suits against these particular Defendants. Similarly, the state is not obligated to amend its public nuisance statute to specifically mention the federal cause of action; the restoration Act solves the problem by "federalizing" all state anti-gaming law. *See* 25 U.S.C. §1300g-6(a). Accordingly, the motion to dismiss for lack of capacity should be denied.

The Court makes the following additional conclusions of law:

1. It accepts and adopts Judge Hudspeth's interpretation of the pertinent law as set forth in his opinions of December 3, 1999, and January 13, 2000, as quoted above.

2. The Speaking Rock Casino is not a "Private Place" as defined by Texas Penal Code § 47.01(8) and the "social" gambling defense is unavailable unless the gambling is conducted on or at a place to which the public does not have access.

3. Any defenses stated in Texas Penal Code § 47.02(b); § 47.02(c) or § 47.029(e), 47.04(b), 47.05(b), 47.06(d), are as a matter of law inapplicable and unavailable to the Defendants in this civil case under the undisputed facts of this case.

4. Any defenses stated in Texas Penal Code § 47.09 and all of its provisions are as a matter of law inapplicable and unavailable to the Defendants in this civil case under the undisputed facts of this case.

5. None of the definitions, exemptions, or defenses set out in the Texas Penal Code provide Defendants with any authority to engage in any of the gaming activities they presently engage in on the Pueblo's reservation.

6. The Defendants' garning activies on its reservation violate the Texas Penal Code and the Restoration Act, 25 U.S.C. 1300g-1, et seq.

7. The evidence in this case has established , and the court so finds, that the Defendants in this case have embarked upon a long-continued habitual course of conduct clearly violative of the Gambling Laws of the State of Texas and that such parties, unless enjoined, will continue such habitual illegal activities at Speaking Rock Casino. More specifically, such Defendants, YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR ALBERT ALVIDREZ, TRIBAL LIEUTENANT GOVERNOR FILBERT CANDELARIA, and GAMING COMMISSIONER FRANCISCO HERNANDEZ have habitually used, and threatened or contemplated the continued habitual use of, a place located in El Paso County, Texas known as, referred to and advertised as the Speaking Rock Casino, which is geographically a part of the Ysleta del Sur Pueblo Indian land and which has a street address of 122 S. Old Pueblo Rd., El Paso, Texas 79907 for the purpose of illegal gambling, gambling promotion and communicating gambling information prohibited by law by providing a place where Defendants charge and collect monetary fees from the

public resulting in an economic benefit to them based upon patrons, guests and customers playing gambling games and betting money on games played with cards, dice and other gambling devices in violation of § 47 of the Texas Constitution; Chapter 47 of the Texas Penal Code, § 125.002 and § 125.021 of the Texas Civil Practice and Remedies Code and 25 U.S.C. § 1300-g-1 et seq. Ysleta Del Sur Pueblo Restoration Act.

8. The operation of a games played with dice, cards, wheels, slot machines, KENO board, off track betting and BINGO cards at Speaking Rock Casino are violations of Texas Penal Code § 47.02 and constitute both a common and public nuisance under Texas Civil Practice and Remedies Code § 125.001 Common Nuisance and § 125.021 Public Nuisance.

9. The State of Texas is entitled to the issuance of an injunction against the Defendants, their agents, employees, and attorneys pursuant to the Texas Civil Practice and Remedies Code § 125.002 and § 125.022 and Rule 65 of the Federal Rules of Civil Procedure requiring said Defendants to cease and desist from operating, conducting, engaging in or allowing others to conduct, operate or engage in gambling and gambling activities on the Pueblo's reservation held herein to be in violation of the Texas Penal Code and prohibited by the Restoration Act, 25 U.S.C. § 1300g-b. The Restoration Act makes it clear that the State of Texas may seek injunctive relief in federal courts to enforce the Act's gaming ban.

10. Under the Restoration Act "tribal council members are not entitled to tribal sovereign immunity" because "tribal officials are not immune from suits for declaratory and injunctive relief." *Comstock Oil & Gas, Inc. v. Coushatta Indian Tribes of Texas*, No. 00-40088, 2001 WL 902139 (August 27, 2001) (citing *TEEA v. Ysleta del Sur Pueblo*, 181 F.3d 676-680 (5th Cir. 1999).

That the State of Texas, through its many prosecuting attorneys, may not have had a consistent and even handed

approach to the enforcement of its gambling laws does not open the door to the Defendants to violate the State's Penal Code. Furthermore, this Court agrees with the State that the undisputed record does not sustain a claim by the Defendants of selective or discriminatory prosecution. The Court further notes this is *a civil* case. The State in seeking injunctive relief is not required to meet criminal law standards or to negate the exceptions or defenses referred to in the Penal Code.

The Defendants ask the Court to consider the "equities" and to refuse, in the exercise of its discretion, to enjoin the public and common nuisance the Tribe has created and is maintaining by its conduct of gaming activities in violation of chapter 47 of the Texas Penal Code and also the Restoration Act. The Tribe points to the beneficial impact of the Pueblo's operation on the Pueblo and upon the El Paso community. It quantifies that "positive impact" at in excess of $800, 000, 000. And the Court is told that unemployment has been reduced to zero among the members of the Pueblo and that over 780 persons, including minorities, are employed in good paying jobs with significant benefits,

The Court recognizes that the Pueblo and its members, and others, have benefitted enormously from the Pueblo's illegal gambling operations, but this circumstance can not justify the clear violation of law. The fruits of this unlawful enterprise are tainted by the illegal means by which those benefits have been obtained.

Under the law the court believes it has no choice but to enjoin the continued operation of this widespread common and public nuisance. But, even assuming the court has some discretion in the matter, it concludes that it would be an abuse of that discretion not to enjoin the gaming and gambling activities under the circumstances of this case.

What the Defendants characterize as "equities" in this case are not such in the eyes of the law. They are matters which

might, however, be brought to the attention of the Congress of the United States or the legislature of the State of Texas, for it is only through legislative change that the Defendants could possibly be permitted to carry on a casino operation of the type they presently conduct on the Pueblo's reservation. Of course, the Court expresses no view on the policy and political issues with which such legislative bodies would be called upon to deal if such legislative initiatives were pursued.

The persons and parties to be enjoined are each and every named Defendant and the officers, agents, servants, employees, and attorneys of each of said Defendants and also any independent contractors and/or consultants employed by, or retained by, any of the Defendants, their officers, agents, attorneys, servants or employees who receive actual notice of this Court's Order and Injunction.

The persons and parties listed above will, by the Court's order and injunction, be required, *inter alia,* to, Cease, Desist, Terminate and Refrain From any involvement in any of the following activities at the Speaking Rock Casino and Entertainment Center or at any place on the Reservation of the Ysleta del Sur Pueblo or on any other property owned or controlled by said Pueblo, to-wit:

A. Gambling activities played with cards, dice, balls or any other gambling device where some, any or all of the persons and parties enjoined receive an economic benefit other than personal winnings. Specifically prohibited are all card games; all dice or die games; all games using one or more balls and a spinning wheel (Roulette) and games involving a vertical spinning wheel, which require players to pay a monetary fee, which directly or indirectly benefits the Tribe, whether such fee is designated an "Ante," "Rake," Service Charge or otherwise.

B. Gambling activities played with cards, dice, balls or any other gambling device where some, any or all of the persons and parties enjoined, charge or collect or attempt to collect any monetary fee as a requirement for any person to bet on or play any game played with cards, dice, balls or any other gambling device, whether such fee is designated an "Ante," "Rake," Service Charge or otherwise.

C. Gambling activities played with cards, dice, balls or any other gambling device where some, any or all of the persons and parties enjoined act as the "house" or "banker" in the same fashion as the operator of a gambling casino and receive some economic benefit from so acting.

D. Providing to any person for their usage a slot machine, the operation of which is calculated to result in an economic benefit to the owner or lessor of the slot machine.

E. Conducting any gambling game from which any person or party enjoined herein is likely to receive any economic benefit other than personal winnings, including, but not limited to:

1. Bingo or any variation thereof;
2. Scratch tickets peel tickets, or pull tabs;
3. KENO or any variation thereof;
4. Tigua Dice, Craps or any variations thereof;
5. Slot Machines;
6. Poker card games;
7. Betting on horse races or dog races;
8. Tigua 21, Blackjack or any variations thereof;
9. Wheel of Fortune, Big Six Wheel, roulette or any variations thereof;

F. Allowing other persons or entities to engage in these enumerated activities on the premises of the Speaking Rock Casino.

The Time Period for Total Compliance

The Court is not certain that it has the discretion to grant the Defendants a brief period within which to shut down their illegal operations in an orderly fashion. However, the Court notes that the State did not initiate this proceeding until 1999, some five plus years after the Defendants started engaging in casino type gambling. A "forthwith" order, if not clearly mandated, should not be used under the circumstances of this case, especially considering the number of people whose lives will be dramatically impacted by the Court's injunction. The Court will therefore grant the Defendants sixty (60) days within which to bring themselves into full and complete compliance with its injunction.

DATED this 27th dayof September, 2001.

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

APPENDIX I

U.S. const. art. III, § 2

The judicial power shall extend to all cases . . . .

25 U.S.C. § 737

Sec. 737.—Gaming activities

(a) In general

All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 736(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

* * * *

25 U.S.C. § 1300g

Sec. 1300g. Definitions

For purposes of this subchapter—

(1) the term "tribe" means the Ysleta del Sur Pueblo (as so designated by section 1300g-1 of this title);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means lands within El Paso and Hudspeth Counties, Texas—

(A) held by the tribe on August 18, 1987;

(B) held in trust by the State or by the Texas Indian Commission for the benefit of the tribe on August 18, 1987;

(C) held in trust for the benefit of the tribe by the Secretary under section 1300g-4(g)(2) of this title; and

(D) subsequently acquired and held in trust by the Secretary for the benefit of the tribe.

(4) the term "State" means the State of Texas;

(5) the term "Tribal Council" means the governing body of the tribe as recognized by the Texas Indian Commission on August 18, 1987, and such tribal council's successors; and

(6) the term "Tiwa Indians Act" means the Act entitled "An Act relating to the Tiwa Indians of Texas." and approved April 12, 1968 (82 Stat. 93).

* * * *

25 U. S.C. § 1300g-1

Sec. 1300g-1. Redesignation of tribe

The Indians designated as the Tiwa Indians of Ysleta, Texas, by the Tiwa Indians Act shall, on and after August 18, 1987, be known and designated as the Ysleta del Sur Pueblo. Any

reference in any law, map, regulation, document, record, or other paper of the United States to the Tiwa Indians of Ysleta, Texas, shall be deemed to be a reference to the Ysleta del Sur Pueblo.

* * * *

25 U.S.C. § 1300g-2

Sec. 1300g-2. Restoration of Federal trust relationship; Federal services and assistance

(a) Federal trust relationship

The Federal trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), as amended (25 U.S.C. 461 et seq.), and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this subchapter shall apply to the members of the tribe, the tribe, and the reservation.

(b) Restoration of rights and privileges

All rights and privileges of the tribe and members of the tribe under any Federal treaty, statute, Executive order, agreement, or under any other authority of the United States which may have been diminished or lost under the Tiwa Indians Act are hereby restored.

(c) Federal services and benefits

Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after August 18, 1987, for all benefits and services furnished to federally recognized Indian tribes.

(d) Effect on property rights and other obligations

Except as otherwise specifically provided in this subchapter, the enactment of this subchapter shall not affect any property

right or obligation or any contractual right or obligation in existence before August 18, 1987, or any obligation for taxes levied before August 18, 1987.

* * * *

25 U.S.C. § 1300g-3

Sec. 1300g-3. State and tribal authority

(a) State authority

Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefiting the tribe, and the State is authorized to perform any services benefiting the tribe that are not inconsistent with the provisions of this Act.

(b) Tribal authority

The Tribal Council shall represent the tribe and its members in the implementation of this subchapter and shall have full authority and capacity—

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency, and

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connnection with any such contract, agreement, or arrangement.

* * * *

25 U.S.C. § 1300g-4(a), (f)

Sec. 1300g-4. Provisions relating to tribal reservation

(a) Federal reservation established

The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary. . . .

(f) Civil and criminal jurisdiction within reservation

The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 of this title.

* * * *

25 U.S.C. § 1300g-5

Sec. 1300g-5. Tiwa Indians Act repealed

The Tiwa Indians Act is hereby repealed.

* * * *

25 U.S.C. § 1300g-6

Sec. 1300g-6. Gaming activities

(a) In general

All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this

section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

* * * *

25 U.S.C. § 2701

Sec. 2701.—Findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

* * * *

25 U.S.C. § 2702

Sec. 2702.—Declaration of policy

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

* * * *

25 U.S.C. § 2703(5), (6), (7) (a) (b), & (8)

Sec. 2703.—Definitions

For purposes of this chapter—

* * * *

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind. . . .

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

* * * *

25 U.S.C. § 2710(b)(1)(A)

Sec. 2710.—Tribal gaming ordinances

* * * *

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A)—such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)[.]

* * * *

25 U.S.C. § 2710(d)(1)(A)

Sec. 2710.—Tribal gaming ordinances

* * * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity[.]

APPENDIX J

COMMENTS OF RAYMOND D. APODACA, EXECUTIVE DIRECTOR OF THE TEXAS INDIAN COMMISSION

. . . .

In addition to the critical lack of educational assistance and the need for health services, the tribes have recently encountered serious problems of a very different nature. The "new" problems are problems which threaten the very existence of the tribes, their lands, and resources, and therefore their members and their welfare. In March 1983, the Attorney General of the State of Texas, Jim Mattox, in response to a request for opinion by the State Parks and Wildlife Commission on the question of state regulation of hunting on the Alabama-Coushatta Reservation, issued Attorney General's Opinion JM-17. This opinion not only asserts the State's right to regulate hunting on the Reservation, but questions the very existence of the Reservation and the Tribe by ruling unconstitutional the "trust" relationship between the State and Tribe. It questions the constitutionality of the State providing funding specifically for programs that benefit tribal members and whether the state can accept or hold in trust lands for the tribe.

As a result of this Attorney General's opinion, several things have happened that threaten the welfare and future of these two tribes. The State Comptroller has questioned whether state appropriations may be expended on the Commission and the Tribes and has for nearly two years, withheld severance taxes on gas and oil production on tribal lands. The Texas Indian Commission was forced to refuse to take tribal lands into trust. And taxing entities such as the school district, counties, water districts, and others have begun to issue tax notices to both tribes on their resources and lands.

The Alabama-Coushatta Tribe has filed suit in defense of the attack on them by this opinion. Even if they should be

successful, there are no assurances that these problems will end, that similar opinions will not be issued again in the future, and more burdensome lawsuits will be required. Since our testimony before the House Interior Committee, Subcommittee on Indian Affairs, on October 17, 1985, an additional problem has arisen with the Texas State Comptroller freezing the entire Alabama-Coushatta Mineral Fund. The Comptroller premised this action upon the assumption that the Alabama-Coushatta Mineral Fund had been approved by the State legislature to the Texas Indian Commission and should be considered "agency" funds. An Attorney General's opinion has been requested by the Comptroller on the Tribe's ability to use any of their funds from their Mineral Fund, in the meantime, the "freeze" has had the affect of depriving the Tribe of the use of their own money.

In the most recent session of the State Legislature, 69th Regular Legislative Session 1985, the Alabama-Coushatta Reservation was appropriated no monies from state general revenue funds and the Tigua Reservation was cut 6%. Although cuts were relatively slight for the Tigua this time, notice has in effect been given by the legislative committees to the Tigua that they too can look forward to progressive cutbacks leading to a phasedown and eventual phaseout of state funds in the very near future.

While the Texas Indian Commission remains committed, as is our legal mandate, to continue to work with, assist, and protect the Tribes and their members, the Commission is concerned that their future and welfare is threatened. There is concern that there is a growing attitude in our State legislature that Texas should not be in the role of being trustee for these two tribes, that the State has no obligation or responsibility in this sense. We are disturbed by the attitude expressed by many legislators that the State should "get out of the Indian business" and concerned that this attitude will eventually prevail, leading to the point that a full termination of both tribes will be effected by the state. . . .

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL NO. P 93 CA 029

YSLETA DEL SUR PUEBLO,
Plaintiff,

v.

STATE OF TEXAS and ANN RICHARDS,
GOVERNOR OF THE STATE OF TEXAS.
Defendants.

AFFIDAVIT OF MIGUEL PEDRAZA

THE STATE OF TEXAS
KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF EL PASO

BEFORE ME, the undersigned Notary Public, on this date personally appeared MIGUEL PEDRAZA, who being by me duly sworn upon his oath, deposed as follows:

My name is MIGUEL PEDRAZA. I am competent to make this affidavit. Every statement herein is within my personal knowledge and is true and correct.

I am a member of the Ysleta del Sur Pueblo. I am the Census Director for the Ysleta del Sur Pueblo. I have in my possession, custody, and control, the census records of the Pueblo. The information contained in this affidavit is compiled from such records.

The Ysleta del Sur Pueblo is located approximately 15 miles southeast of Downtown El Paso, and is within walking distance of the border between the United States and the Republic of Mexico. Pueblo realty totals 28.7 developed acres in non-contiguous locations used for housing and tribal administrative purposes, and another 37.3 acres of non-developed desert land. Tribal membership is 1,284 persons. The Tribe is governed under a traditional Pueblo system with a nine member tribal council, which consists of the Cacique, Governor, Lieutenant Governor, War Captain, Aguacil, and four councilmen at large.

On August 18, 1987, the United States Congress passed PL 100-89, which provided for the restoration of the federal trust relationship and the federal services in assistance to the Pueblo.

A 1993 census analysis indicates that 945 tribal members live within the immediate service area of the Pueblo and 339 tribal members live outside El Paso and Hudspeth County, Texas. These numbers do not include the number of non-eligible housing project and surrounding neighborhood residents that do not meet the 1/8th blood quantum necessary for tribal membership. As of March 17, 1993, 636 females compromise 50% of the total tribal population with the remaining 50% comprised of 634 males.

In March of this year, I and Census Officer Elias Torrez performed an income analysis of tribal membership. Sixty-eight percent of the heads of household have less than $15,000 in annual income, with and additional 16% receiving less than $5,000 annually. Only 1.5% of the head of households earn an annual income greater than $30,000.

Further, Affiant saith naught.

/s/ Miguel Pedraza
MIGUEL PEDRAZA

SUBSCRIBED AND SWORN TO BEFORE ME on this the 21st day of July, 1993, to certify which witness my hand and official seal.

/s/ Illegible
Notary Public
State of Texas

My Commission Expires:
2-11-95

APPENDIX L

Executive Summary

Economic Impact of Speaking Rock Casino

In November 1993 the Tigua Indian Tribe of the Ysleta del Sur Pueblo opened the Speaking Rock Casino. The primary goal of the Casino operations was to improve the economic conditions of the Pueblo members. Since the Pueblo economy is so closely tied to that of the rest of El Paso, any economic influences on the Pueblo affects the entire city.

This economic impact study has identified the following positive economic effects:

1. International Business Planners has estimated the total local direct and indirect economic impact to be approximately $823 million since the Casino opened in November 1993 through September 1999.
2. Since the Casino opened an estimated $150 million dollars, not including payroll, has been contributed directly to the El Paso economy. Over 75% of the Casino's expenditures have been made locally.
3. The Casino's payroll over this period has totaled almost $50 million dollars. Most of this payroll would have been spent locally.
4. At the current time, approximately 785 persons are employed by the Casino with an annual payroll of approximately $14 million dollars. The Speaking Rock Casino is one of El Paso's largest employers.
5. The Casino has provided many employment opportunities at the Casino for minorities. Of those who have been employed since the opening almost nine-two percent have been minorities. Hispanic employees made up almost eighty three percent of

the employees. Native Americans constituted approximately seven percent.

6. Most employees of the Casino reported that their job at the Casino represented an improvement in their economic position. Over one-third of the employees reported being unemployed prior to their current job.

7. Because of the monies provided by the Casino's operations the Pueblo has been able to make $124 million dollars in expenditures, over eighty percent in the local area.

8. The funds received from the Casino have enabled the Tribe to move towards economic self-sufficiency. Before 1993 Tribal government was operating at a substantial fiscal deficit. The Pueblo is now able to increase its governmental functions and generate a surplus. The surplus is planned for investment in other enterprises to diversify the economic base and to provide additional opportunities for the Pueblo members.

9. Prior to the Casino unemployment among the Pueblo members was estimated to be approximately fifty percent. This has been reduced to virtually zero.

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

[Filed Apr. 18, 2002]

DOCKET NO. 9:01CV299

ALABAMA-COUSHATTA
TRIBES OF TEXAS,

VS.

THE STATE OF TEXAS.

LUFKIN, TEXAS
APRIL 2, 2002
8:45 A.M.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOHN HANNAH, JR.,
UNITED STATES DISTRICT JUDGE

* * *

[169] (Witness sworn)

VIRGINIA BOYLAN, PLAINTIFF'S

WITNESS, SWORN

DIRECT EXAMINATION

[170] BY MR. CROWELL:

Good afternoon, could you state your full name for the record?

A Virginia W. Boylan.

Q And what is your occupation?

A I'm an attorney.

Q And can you tell the Court what your legal background or educational background is?

A Uh-huh. I graduated law school in 1979 and went immediately to work for the U.S. Senate Committee on Indian Affairs, and I worked there for 15 years. And in 1993 I joined the law firm of Dorsey and Whitney where I practice Indian law. So I've been practicing Indian law for 23 years.

Q And what were your duties and responsibilities when you were on the Senate Committee staff?

A Yeah, I was staff. I was senior counsel and deputy chief counsel and all those different things. Basically shepherding legislation through the Congress, through the Senate side anyway, and—

* * *

[178] And that's the gist of Cabazon.

Q I would like you to look at the next slide, which is language in the Restoration Act as passed. When you read that language, do you understand it to be consistent or inconsistent with the Cabazon decision?

A I think it's totally consistent. All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on land—and on lands of the tribe. That's exactly the same. The reverse—if it's permitted to be played is an obvious inference from that. If it's prohibited, it's prohibited for everybody.

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

Q And you stated that you were chief counsel of the Senate Committee, is that correct?

A At that time, yes, I was chief counsel.

Q And was—is it the custom and tradition of members of the Senate Committee staff to be familiar with the Supreme Court or the federa court's usage of certain terms as it relates to legislation?

A That's absolutely correct. . . .

* * *

[180] Q As you look to the two slides on the Power Point, the first being the language of the Supreme Court decision and the second being the language of the Restoration Act, is it your opinion that it was just wild coincidence that they used the exact same words?

A It absolutely was not. It was—the Cabazon case was decided in February and the Restoration Act I think was – this language was changed in the summer, June, July. I mean, the bill passed in July of '87, as I recall. So the use of these words indicated the use or the desire of Congress and I think the Senators who were—at least that we worked with, to preserve the right of the tribes to do gaming in Texas.

* * *

[186] (Witness sworn)

FRANK DUCHENEAUX,

PLAINTIFF'S WITNESS, SWORN

[187] DIRECT EXAMINATION

Q And what is your educational background?

A I'm a graduate of the University of South Dakota Law School in 1956.

Q And what is your employment background?

A In 1957 I was employed by the Bureau of Indian Affairs in Washington, DC in their Congressional relations office. I served in that capacity until December of 1970. From 1970 to March of 1973 I was a consultant with the National Congress of American Indians on legislative affairs. From March of 1973 to December of 1990 I was the counsel on Indian affairs to the

Committee on Interior and Insular Affairs of the United States House of Representatives. And beginning in 1991 I entered my current occupation.

Q So you were staff to Congress for how many years?

A Almost 18 years.

Q And you were staff during—during the entire 1980s, is that correct?

A Yes.

Q Okay. And what was the general jurisdiction of the—let [188] me strike that.

You were with the Interior and Insular Affairs Committee?

A Yes.

Q And you were chief counsel, is that correct?

A No. I was counsel on Indian affairs to the subcommittee—counsel on Indian affairs to the subcommittee on Indian affairs for about four years. Then from 1977 I was counsel on Indian affairs to the full committee.

Q We've already had testimony earlier this afternoon regarding the history of the Tigua, Ysleta del Sur and Alabama-Coushatta Restoration Act. Are you familiar with that Act?

A Yes.

Q And were you on staff at the time that that Act came to the jurisdiction of the Congress?

A Yes.

Q And is it fair to say that you have a knowledge of the customs and traditions and the rules and the procedures of the House of Representatives?

A Yes.

* * *

[195] When the Court rendered its decision in Cabazon in February of '87, the whole thing shifted and now the states and others who were opposed to Indian gaming were on the weaker bargaining side.

So it was very much affected—those Court decisions, those Court actions, very much affected our—affected how the general gaming legislation developed in the Congress.

Q And what happened when the Court decision came out? Did that change the bargaining?

A Yes, I think I have indicated that when the Supreme Court decision was handed down, the Indian position in Congress was greatly strengthened, and we drafted—we withdrew the bill—in the House side we withdrew the bill or tabled the bill we had—Mr. Udall had introduced, and we drafted and Mr. Udall introduced a much more pro-Indian bill after the case came down.

Q And regarding what tribes were able to do in connection with gaming activities on their lands, what did you understand the Supreme Court to say?

A Well, as I indicated, we had—we had followed and I had followed the development of the courts—the federal court [196] posture for about four or five years, beginning with a case called the Seminole case in I think '83 or somewhere in there, and then the Berona Ranch case out of California where there was articulated by the court what came to be known as the criminal prohibitory-civil regulatory test, and when those test—when that test was applied in those two cases by the circuit courts involved, they upheld the right of Indian tribes to game.

And that was a similar decision by the court in the Cabazon case, which—the circuit court, which eventually the Supreme Court took. And when it rendered its decision, it was my understanding that the Court fully upheld the application of the criminal prohibitory civil regulatory test to Indian gaming.

Q Now, do you have an opinion as to whether your colleagues in the other House, in the Senate, were also following the language?

A I know they were. I talked with them on the general legislation regularly.

Q And the Supreme Court decision came down while the Senate was deliberating the version of the bill that came over from the House in the spring of '87, is that correct?

A The version of which bill? I'm sorry.

Q The version of the Restoration Act.

A Yes, I think we—we passed the bill in the 100th [197] Congress a few days after the Cabazon decision was rendered, and so when the bill got to the Senate, the Cabazon decision by the Supreme Court was in existence.

Q And the Senate changed the stringent language that you referred to earlier, is that correct?

A Yes.

Q And they referred that amendment back to the House, is that correct?

A The Senate Committee reported our bill with amendments, including an amendment to section 107 and section 207 relating to the gaming issue, and passed it on the floor of the Senate and the bill was returned to the House for concurrence.

Q And reviewing Exhibit P-84, can you explain to the Court the procedural context in which the discussion of the Restoration Act occurred on August 3rd, 1987?

A Under the procedures and practices of the House of Representatives then and I believe now, when a bill—when a House passed bill was returned from the Senate with amendments, the bill automatically was laid on the Speaker's table pending some further action.

As staff on the committee handling Indian affairs, it was our responsibility working for the Chairman to see that the appropriate kind of action was taken. So we would have—we would have been aware, and I know we were aware, of what the Senate had done because we were the House staff responsible for [198] the bill. We would have advised the Chairman of the action of the Senate and made recommendations to him as to how we felt he should proceed.

In this case we advised the Chairman of the committee, Mr. Udall, that we were familiar with the amendment and recommended that he secure House concurrence in the Senate amendments.

Q What other options did he have?

A Under the rules of the House, the Chairman of the committee could have moved or ask unanimous consent that the bill be referred back to the Interior Committee. The Chairman could have moved or asked unanimous consent to concur in the Senate amendment with a further amendment and sent it back to the Senate. He could have moved or asked unanimous consent to disagree to the Senate amendment and request a conference with the Senate. Those were basically his options.

Q And what exactly did he do?

A He—he did not do it himself personally, but he decided that—upon our recommendation that he should ask unanimous consent of the House to concur in the Senate amendment—amendments.

Q And as you read the discussion in Exhibit P-84, is it in that context in which this discussion occurred?

A Yes.

Q And it's already been read into the record, but I would [199] like you to take a couple of minutes to familiarize yourself with the discussion that occurs on the House floor and is identified starting on the lower far right corner of page H 6974 and ends in the middle of the middle column on page H 6975.

A Yes.

Q And that makes reference to the Cabazon opinion, is that correct?

A That's correct.

Q And do you know how those statements came about?

A As I indicated, we would have the staff, Mr. Skibine and I, after checking with minority staff and working with the full committee, chief counsel and the committee staff director, we would—the chief counsel would have met with the staff of the House, the Speaker's staff, the Majority Leader's staff, to advise them of the intention of the Chairman of the full committee to seek recommendation to dispose of the bill with the Senate amendments.

You know, the staff has to run the floor, and they have to provide time for these things to be done, and he would have to secure a time, a day and a time, in which the Speaker would recognize the Chairman to make these appropriate motions.

In the mean—when that had been done, the staff would have, working with the Chairman, drafted a statement explaining the action of the House in concurring in the Senate amendments, [200] and this is what this reflects.

Q And who is Mr. Vento?

A Mr. Vento, now deceased, was a senior member of the Interior Committee from the State of Minnesota.

Q And was he acting as Chairman Udall's designee?

A Yes, he was.

Q And was he speaking on behalf of himself or on behalf of the committee?

A He was speaking—under the rules of the House, he was speaking in the name of Chairman Udall on behalf of the Interior Committee.

Q Given your understanding of the Cabazon opinion, what is your understanding of what constitutes prohibited games that tribes are unable to play?

A We understood, the staff of the committee, Mr. Udall, after working on this for quite awhile, we understood the Cabazon rationale provided that an Indian tribe in a state was, as a matter of federal law, prohibited from engaging in or licensing and regulating any form of gaming that was prohibited by the criminal laws of the state.

Q By prohibited by the criminal laws of the state, would that allow a state to say I'm criminally prohibiting everybody in the Eastern Texas from doing it but I can allow people in Western Texas to do it?

A No. We understood, again on the staff, working very [201] closely with the—in light of the court decisions, and particularly when the Seminole case came out first I think in '83, that the—even though the state might apply criminal sanctions to a violation of civil regulatory law, the court had

held that this did not convert the civil regulatory law into a criminal law. So we were very clear that it had to be prohibited as a matter of criminal law to all parties in the state, to all persons.

Q What if the state law was that it's prohibited for everybody except for the state itself?

A I think the court—the courts, the circuit courts and Supreme Court, made it very clear that if the state law permitted anyone in the state to engage in gaming activity for whatever purpose, that meant that this was a matter of civil regulatory law, and under the Cabazon rationale, tribes were entitled as a matter of federal law to engage in those activities.

Q Do you think it was just wild coincidence that the words used by the Supreme Court in the Cabazon decision are the same words used by the Senate in their amendment when they amended the bill in the spring of '87?

A No.

Q Do you think it was deliberate?

A Yes.

MR. CROWELL: Thank you. I have no more questions.

Supreme Court, U.S.
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No. 01-1671

In the Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *ET AL.*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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No. 01-1671

In The Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *ET AL.*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

Respondent, the State of Texas, submits this brief in opposition to the petition for writ of certiorari filed by petitioners. The Fifth Circuit resolved this appeal in a one-sentence, unpublished, per curiam decision that upheld the district court's permanent injunction closing petitioners' casino as it operated in violation of both Texas and federal law. Petitioners do not identify an issue on which courts are divided, nor to they point to an important issue of federal law that demands the Court's attention. Instead, they come to the Court asking first for the review of a 1994 Fifth Circuit decision, *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (CA5 1994) ("*Ysleta I*"), *cert. denied*, 514 U.S. 1016 (1995), and second for what is essentially "error correction"—asking the Court to correct the Fifth Circuit's mistaken application, in their view, of established rules of statutory construction. For these reasons and those elaborated below, the Court should deny the writ.

STATEMENT OF THE CASE

I. THE CASINO.[1]

In 1987, Congress passed the Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act ("the Restoration Act"), 25 U.S.C. §1300g *et seq*., granting to the Ysleta del Sur Pueblo Indian tribe, which resides in Texas, the status of a federally recognized American Indian tribe. As a condition of obtaining this federal recognition, the tribe agreed it would not engage in commercial gambling. *See Ysleta I*, 36 F.3d, at 1327-29 & n.2. Accordingly, during its bid to obtain federal recognition, the tribe adopted Tribal Resolution No. TC-02-86, in which it stated its firm determination not to engage in gambling on its lands. *See id.*, at 1327-28 & n.2 (setting out the resolution). The tribe requested that Congress embody its resolution in the Restoration Act to assure that there would be no bingo or high-stakes gambling on its lands:

> "The Ysleta del Sur Pueblo respectfully requests its [congressional] representatives . . . to amend §107(a) of the Restoration Act . . . [with] language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited in the Tribe's reservation or on tribal land." *Id.*, at 1328 n.2

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1. The State objects to the argumentative approach and conclusory statements found in petitioners' statement of the case. *See* SUP. CT. R. 15.2. Because the objectionable matters are so numerous, the State includes a statement of the case, and individually addresses some specific statements in this opposition. Additionally, the State directs the Court to the district court's opinions, which include a fair recitation of the factual and procedural history of this case. *See* App., at 6a-7a, 32a-60a.

The tribe's resolution was incorporated into the Restoration Act. *Id.*, at 1329-30; *see* 25 U.S.C. §1300g-6(a) ("The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86"). Relying on the tribe's commitment, and intending to "'ban gaming on the reservation[] as a matter of federal law,'" *id.*, at 1329 (citation and quotation omitted), Congress restored the tribe's federal trust status and recognition by passing the Restoration Act, which prohibits on the "reservation and on the lands of the tribe," "[a]ll gaming activities which are prohibited by the laws of the State of Texas."[2] *See* 25 U.S.C. §1300g-6(a).

Despite the tribal resolution and the terms of the Restoration Act, in the early 1990s the tribe petitioned then-Governor Ann Richards to enter into a tribal-state compact under the Indian Gaming Regulatory Act (IGRA) to allow it to open a commercial casino. *See Ysleta I*, 36 F.3d, at 1331 & n.12; *Texas v. Ysleta del Sur Pueblo*, 79 F.Supp.2d 708, 710 (W.D. Tex. 1999) (noting that in spite of Restoration Act, tribe tried to compel the State to negotiate a compact permitting gaming under IGRA), *aff'd*, 237 F.3d 631 (CA5 2000) (unpublished), *cert. denied*, 532 U.S. 1066 (2001). When Governor Richards rejected the tribe's entreaties, the tribe sued. Pet., at 8.

On appeal, the Fifth Circuit reviewed the language and legislative history of the Restoration Act, and concluded that the

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2. Petitioners misstate the purpose of the Restoration Act as enabling the State "to treat Indians differently from other citizens," Pet., at 5 (quoting S. REP. NO. 90-1070, at 1 (1968)), but the Act and its legislative history show that it was intended to restore the tribe's federal trust status while ensuring that the State's ban on commercial casino gambling remained intact. Moreover, the tribe is not treated differently than any other citizen in this regard, as no one can lawfully operate a commercial casino in Texas. *See* App., at 61a-62a & n.12.

State had no obligation to negotiate a gaming compact under IGRA because the Restoration Act, not IGRA, governs gambling by the tribe. *Ysleta I*, 36 F.3d, at 1331, 1334. The Fifth Circuit then dismissed the suit because the Restoration Act did not waive the State's Eleventh Amendment immunity *Id.*, at 1335-36.

During the pendency of *Ysleta I*, however, and despite its earlier agreement, the tribe opened the Speaking Rock Casino on its reservation in El Paso, Texas. Pet., at 10. And, in 1996, despite the Fifth Circuit's decision that the Restoration Act codified the tribe's commitment to prohibit gambling on the reservation, *id.*, at 1333-34 & n.19, the Tribal Council enacted a gaming ordinance authorizing high-stakes gambling on the tribe's lands.[3] App., at 33a & n.2.

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3. Petitioners make unsupported and incorrect assertions regarding the casino's history. Petitioners contend that the State "was aware of and did not object to NIGC's oversight of the Tribe's Class II gaming activities," without record citation; that the State "participated in activities necessary for the NIGC to approve the Class II management agreement," without citation; and that the State offered to negotiate a compact under IGRA for Class III lottery and pari-mutuel racing, again without any record citation. Pet., at 10. These assertions, which are largely new, have no relevance to the legal issues in the petition. Petitioners also assert that its "Class II" gaming (bingo) was conducted under "the auspices of the National Indian Gaming Commission," presumably referencing a 1993 letter from the NIGC Commissioner Chairman that it claims authorized the opening of the casino. The Chairman's opinion, however, is conditioned on the application of IGRA to the tribe and the tribe is *not* governed by IGRA. Moreover, his opinion carries little weight because it is not the product of an adjudication or rulemaking, and is unsupported by any analysis. *Cf., e.g., United States v. Mead Corp.*, 533 U.S. 218, 229-34 (2001). In any event, "no deference is due" because "Congress has spoken directly to the question" through the Restoration Act. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

From 1993 until earlier this year, when its operation was enjoined, the tribe continuously operated its 24-hour, commercial casino. *Id.*, at 33a-34a. Open to the public, the tribe advertised the casino, operated a promotional website, and distributed certificates redeemable for casino tokens. *Id.*, at 35a, 65a-66a. The casino offered high-stakes bingo with $1,000 prizes and side games awarding as high as $15,000; keno games every six minutes with possible winnings as much as $100,000; craps ("Tigua Dice"); over 1000 slot machines with payoffs ranging up to $25,000; poker games; off-track betting on horse and dog races; a "Big Six Wheel"; and Tigua 21 (blackjack). *See* App., at 33a n.2, 65a. In the year 2000, the casino enjoyed revenues in the range of $50-60 million.

II. THIS LAWSUIT.

After the State filed suit in 1999 seeking a permanent injunction against the casino's operation, the tribe, without success, sought to dismiss the case on the basis of tribal immunity. *See* App., at 5a-16a, 17a-24a; *see also Texas v. Ysleta del Sur Pueblo*, 79 F.Supp.2d 708 (W.D. Tex. 1999), *aff'd*, 237 F.3d 631 (CA5 2000) (unpublished), *cert. denied*, 532 U.S. 1066 (2001). At the close of the tribe's fruitless collateral-order appeal, the district court took up the case on cross-motions for summary judgment. After a hearing, on September 27, 2001, the court granted judgment to the State, denied the tribe's motion, and permanently enjoined the casino's operation as prohibited by Texas law.[4] App., at 25a-29a, 31a-80a.

The Fifth Circuit granted the tribe a stay which allowed the casino to remain open and expedited the tribe's subsequent appeal.

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4. Texas's anti-gambling laws are found in Chapter 47 of the Texas Penal Code. TEX. PENAL CODE §47.01 *et seq*. These provisions are not set out in this opposition because they are not implicated by petitioners' arguments.

After briefing and argument, the Fifth Circuit, in a one-line, per curiam, unpublished decision, affirmed the district court's judgment in all respects. App., at 2a; *see also id.*, at 1a. The stay was subsequently lifted, requiring the casino's closure on February 11, 2002, as the tribe's application for a stay of the mandate, which was submitted to Justice Kennedy due to Justice Scalia's unavailability, was denied that day.[5]

ARGUMENT

I. PETITIONERS HAVE PRESENTED NO REASON FOR THE COURT TO EXERCISE ITS DISCRETION AND GRANT THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE.

A. Petitioners' Issues Do Not Satisfy the Court's Prerequisites for Review.

Remarkably, petitioners devote only one paragraph of their petition to challenging the Fifth Circuit's decision and judgment in this case, Pet., at 25-26, and instead devote the majority of their energy to challenging the Fifth Circuit's 1994 decision in *Ysleta I*. *See, e.g., id.*, at 4 ("The 1994 decision in *Ysleta I* is fundamentally flawed and should be corrected . . ."); *id.*, at 15 ("The Fifth Circuit committed fundamental errors in *Ysleta I*"); *id.*, at 15-25 (discussing claimed errors in *Ysleta I*). The petition is admittedly aimed at the decision in *Ysleta I*, but petitioners completely ignore the clear principle that this Court "'reviews judgments, not opinions.'" *Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996) (Ginsburg & Souter, JJ., opinion on denial of petition for writ of certiorari) (quoting *Chevron*, 467 U.S., at 842).

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5. The district court later modified its injunction to allow the tribe to engage in certain limited activities at the casino that the court determined did not violate Texas law. *Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320 (W.D. Tex. May 20, 2002) (order modifying injunction). This appeal does not implicate the district court's later order.

The proper focus of petitioners' complaint, then, should not be the 1994 opinion in *Ysleta I*, but on the Fifth Circuit's judgment in *this* case. And petitioners do not, and cannot, suggest that the issues presented in this appeal satisfy any of the Court's typical prerequisites for review. *See* SUP. CT. R. 10. The petition does not establish a conflict between federal courts of appeals on an important matter, *id.*, (a); the Fifth Circuit did not create a conflict on an important federal question with a state court of last resort; *id.*, (b); the Fifth Circuit did not abandon the straight and narrow of "the accepted and usual course of judicial proceedings" so that this Court's intervention is needed, *id.*, (a); and the court of appeals did not decide an important question of federal law that has yet to be settled by this Court, or in a way that conflicts with this Court's decisions, *id.*, (c).

In short, petitioners fail to explain why an unpublished, one-sentence decision on a statute limited to two tribes in Texas presents an important question of federal law, represents a troublesome division among courts, or implicates a question of widespread public significance. Appreciating their tenuous position, instead of attempting to meet the strictures of Rule 10, petitioners readily confess that their petition is a plea for error correction and ask for ad hoc review of their arguments, a plea the Court should resist.

B. Instead, the Tribe Asks the Court to Engage in the Extraordinary Task of Error Correction.

Petitioners, throughout, denounce *Ysleta I* as incorrectly decided and ask the Court to essentially redecide that appeal. Setting aside the fact that it is not appropriate to review *Ysleta I* seven years later, this challenge falls short of demonstrating that the case is worthy of review for two reasons. First, correcting a misstep by a court of appeals is simply not the Court's customary task. Even the example provided by petitioners in urging the Court to step into an "error correction" role did not merely require the Court

to repair a misapplication of established rules. *See* Pet., at 14. In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court considered a question having importance to far more than just the litigants in that action: whether the Interstate Commerce Act precludes a state-court action on a matter reached by the Interstate Commerce Commission. *Id.*, at 331. In any event, it is beyond doubt that "this Court is not a forum for the correction of errors." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting).

Second, petitioners do not contend that there has been an intervening change in the relevant law since 1995, nor that anything that has transpired in the last seven years makes the case more worthy of the Court's review that it was in 1995. The centerpiece of petitioners' arguments continues to be the patently incorrect assertions that IGRA, and not the Restoration Act, applies to gambling on their lands, and alternatively, if the Restoration Act reaches petitioners, the statute uses the term "prohibited" in a way that does *not* prohibit, but instead *permits*, their casino operation. *Compare, e.g.,* Pet., No. 01-1671, at p. i (stating as question presented: "Does the Indian Gaming Regulatory Act, instead of the Pueblo's Restoration Act, govern gaming activities on the reservation lands of the Ysleta del Sur Pueblo?") *with* Pet., No. 94-1161, at pp. i, 6 (presenting as question for review whether Fifth Circuit erred in concluding that Restoration Act governed petitioners, and not IGRA); *compare also* Pet., No. 01-1671, at p. i (posing as question for review whether Restoration Act provisions should be interpreted consistently with *Cabazon Band*) *with* Pet., No. 94-1161, at pp. 9-10 (contending that "prohibit" must be construed in light of *Cabazon Band*); *see also Ysleta I*, 36 F.3d, at 1331 ("The Tribe maintains that the term "prohibit" has special significance in federal Indian law, which is derived from *Cabazon Band*..."). In their present petition to the Court, petitioners simply repeat their assertions that the Fifth Circuit erred in 1994. These arguments were unavailing then, and equally ineffectual now.

No matter the hyperbolic statements of petitioners,[6] the actual issues of the petition belong to *Ysleta I*, and are not appropriate for the Court's review. The writ should be denied.

II. *YSLETA I* WAS CORRECTLY DECIDED.

Although there is no need for the Court to reach the question of whether *Ysleta I* was correctly decided, should that issue be reached, the merit of that decision is easily established. Petitioners assert that three mistakes occurred in *Ysleta I*: (1) that the court of appeals erred in holding that the Restoration Act, and not IGRA, governs the tribe's gaming activities; (2) that it wrongly concluded that Congress did not codify *Cabazon Band* in the Restoration Act; and (3) that the Fifth Circuit issued an "unconstitutional advisory opinion" that should be regarded as dicta. Petitioners are wrong on all counts.

A. The Fifth Circuit Correctly Decided in 1994 That IGRA Did Not Impliedly Repeal the Restoration Act.

Because fundamental differences in IGRA and the Restoration Act prevent them from being read together, the *Ysleta I* court determined which statute controlled. 36 F.3d, at 1335. It correctly rejected the argument that IGRA impliedly repealed the Restoration Act, and decided that the Restoration Act, as the more specific of the two statutes, governs the tribe's gambling, not IGRA.

Petitioners do not, and cannot, point to any indication in IGRA that Congress was expressly repealing the Restoration Act. Without

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6. *See, e.g.*, Pet., at 3 ("This case asks whether the federal courts can deny the rights and privileges accorded Indian Tribes by an express act of Congress."); *id.*, at 15 (claiming an "abuse of the opinion writing process in violation of Constitutional strictures" and that the Fifth Circuit granted the State "regulatory power" on tribal lands despite "a specific Congressional prohibition").

a clear intention, it is well-settled that "[a] specific statute will not be controlled or nullified by a general one." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Petitioners' only attack on the reasoning in *Ysleta I* on this issue is that the Fifth Circuit misidentified IGRA as the more "general" of the two statutory schemes, which led in their view, to the faulty conclusion that IGRA did not impliedly repeal the Restoration Act as it regards gambling. *See* Pet., at 15-19. Petitioners' characterizations of the two statutes utterly lack merit.

Petitioners contend that the Fifth Circuit erred in calling the Restoration Act the more "specific" of the two, attributing that conclusion to a reliance on Congress's statement in IGRA that IGRA should be read in light of other federal law and the absence in IGRA of a blanket repealer clause. *See* Pet., at 16-18; *see also Ysleta I*, 36 F.3d, at 1334-35. But petitioners' effort to demonstrate error is futile. The court of appeals relied on the Restoration Act's narrow tailoring to conclude that it was the more specific of the two, and additionally noted other various indications that Congress had no intention to repeal the Restoration Act, including the absence of a repealer clause and the actual language of IGRA that it should be interpreted in light of other federal law. *Id.*, at 1334-35. Comparing the two statutory schemes, the Restoration Act is a "specific" statute, whereas IGRA is a general one. The former applies to two particular Indian tribes located in one state, and the latter applies generally to tribes across the country. A statute having nationwide application cannot be more specific than a law that specifically addresses particular tribes.

Moreover, in claiming that the Restoration Act was repealed, petitioners fail to address the central issue of legislative intent. With the interpretative canon of "implied repeal," "the primary consideration is the intent of Congress," and even indicia of detail and specificity in a statute cannot override congressional intent. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380 (1996)

(citation and quotation omitted); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 102 (2001) (canons of statutory construction are not mandatory rules, but guides to assist courts in determining legislative intent). Additionally foreclosing petitioners' argument is the strong presumption against repeal by implication. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549, 551 (1974).

Petitioners also cite decisions in which IGRA governed, in an attempt to support the general proposition that IGRA trumps other statutes. Pet., at 18-19 (citing cases). Those decisions, however, do not illustrate any implied repeals by IGRA, as petitioners admit. *See* Pet., at 19 (each of these cases necessarily deals with . . . a *different* question of statutory reconciliation") (emphasis added). The two Public Law 280 cases—*Lac du Flambeau Band v. Wisconsin*, 743 F.Supp. 645 (W.D. Wis. 1990), and *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (CA9 1994), *cert. denied*, 516 U.S. 912 (1995)—did not concern a conflict between Public Law 280 and IGRA, nor consider a repeal by implication. In *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1180 (CA10 1991), "implicit repeal analysis [wa]s inapposite," and the Tenth Circuit explained that it was well-established that the Assimilative Crimes Act had application only when Congress leaves a topic or conduct unaddressed—it "serve[s] interstitially during congressional inaction," *id.*, so that there was no conflict between statutes.[7] Lastly, *Rhode Island v. Narragansett*

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7. That court did observe in a footnote that even if the ACA had continued vitality for Indian gambling after IGRA, the explicit terms of IGRA establishing the United States's jurisdiction as "exclusive" over gambling crimes on reservation lands indicated Congress's *clear* intent to supplant the ACA's jurisdictional gap-filler. *United Keetoowah*, 927 F.2d, at 1180 n.19. Petitioners have identified no indication of any such "clear intent" in IGRA regarding the substance of the Restoration Act.

Indian Tribe, 19 F.3d 685, 694, 703-06 (CA1 1994), is easily distinguished because the pre-existing statute considered in that case lacked a specific gaming provision, and Congress eliminated from IGRA a draft provision removing the tribal lands at issue from IGRA. Conversely, the Restoration Act specifically addresses gambling by petitioners, and there is no reference to the Restoration Act in IGRA's legislative history.

Moreover, IGRA does not apply to tribes universally, as petitioners would hope, and exclusion of a tribe from IGRA's coverage does not render a court decision dubious. In fact, petitioners acknowledge that some tribes are not reached by IGRA as Congress has enacted statutes specific to particular tribes. *See* Pet., at 19 n.4 (noting 25 U.S.C. §1708(b) (provision applicable only to Narrangansett Tribe) and 25 U.S.C. §9411 (provision governing Catawba tribe)); *see also, e.g., Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (CA D.C. 1998); *Akins v. Penobscot Nation*, 130 F.3d 482, 484-85 (CA1 1997); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787-88, 794 (CA1 1996). In a final confirmation that the Fifth Circuit rightly recognized that Congress did not impliedly repeal the Restoration Act's gambling prohibition, Congress has acquiesced to *Ysleta I* for eight years, and has not, as it has done other times, amended legislation following what it regards as an incorrect court decision. *E.g., Narragansett*, 158 F.3d, at 1335.

With no real doubts about the correctness of the Fifth Circuit on the implied repeal issue, the question lacks the claimed importance to litigants faced with conflicting federal statutes. *See* Pet., at 19. Although the application of the Restoration Act versus IGRA may be significant to the two tribes governed by the Restoration Act,[8] the issue has been settled since 1994, and has not

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8. The Restoration Act also restored the trust relationship between the federal government and the Alabama-Coushatta Indian Tribes of

muddied the waters or enjoyed any recognizable significance in litigation involving implied repeals.

B. The Fifth Circuit Correctly Held That the Restoration Act Was Not Enacted with an Eye Towards *Cabazon Band*.

1. The legislative history of the Restoration Act establishes that the Act is not to be read in light of *Cabazon Band*.

Petitioners accuse the Fifth Circuit of improper statutory construction when it decided in *Ysleta I* that the Restoration Act's term "prohibited" did not codify the Court's analytical approach in *Cabazon Band*. Pet., at 20-25. The court of appeals, however, employed well-established rules of statutory interpretation in an uneventful and straightforward way to read the Restoration Act's gambling prohibition.

In petitioners' view, the term "prohibited," as in the provision, "[a]ll gaming activities which are *prohibited* by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe," 25 U.S.C. §1300g-6(a) (emphasis added), carries a special meaning in the field of Indian law exemplified by the civil-regulatory/criminal-prohibitory dichotomy in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The

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Texas and the provisions pertaining to the Alabama-Coushatta Tribes' gambling are the same as those in 25 U.S.C. §1300g-6. *See* 25 U.S.C. §§731 *et seq.* Litigation brought by the Alabama-Coushatta Tribes against the State seeking a declaratory judgment that the federal statute does not prohibit it from running casino gambling has resulted in a recent decision adverse to the tribe and a permanent injunction enjoining its casino gambling operation. *See Ala.-Coushatta Tribes of Tex. v. Texas*, __ F.Supp. 2d __, No. 9:01-CV-299, 2002 WL 1369473 (E.D. Tex. June 25, 2002).

distinction in that decision arose with Public Law 280, a statute that applied to six states, but not Texas. *See Ysleta I*, 36 F.3d, at 1330 n.8. In *Cabazon Band*, the Court considered California's authority to enforce its bingo statutes on a reservation under Public Law 280 (18 U.S.C. §1162(a), and 28 U.S.C. §1360(a)), which granted California authority to (1) enforce its criminal laws on reservations, and (2) hear in state courts civil cases involving a tribe member. 480 U.S., at 207-08. The critical inquiry for the Court was whether the state law at issue was "criminal," so that it applied to reservations under Public Law 280, or "civil" and therefore inapplicable. *Id.* The Court relied on the law's practical effect for the answer—it is "criminal" if it generally prohibits conduct, but "civil" if it regulates the conduct. *Id.*, at 209-10. Applying the dichotomy, the Court decided that California's bingo statute was not "criminal," because it "generally permits the conduct at issue, subject to regulation,"*id.*, at 209, and thus Public Law 280 did not authorize California to prohibit tribes from offering bingo.

Petitioners contend that *Cabazon Band*'s dichotomy informs not only the term "criminal law" in Public Law 280, but also animates the term "prohibited" in the Restoration Act so that it only means utterly forbidden.[9] *See* Pet., at 21; App., at 50a-51a. Even assuming that *Cabazon* translates to the statutory term "prohibited,"[10] petitioners' sole indication of Congress's intent to

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9. Petitioners have not suggested that their gambling activities are not illegal under Texas law—their contention is that the Restoration Act has a special meaning for "prohibited" so that such activities are outlawed only if Texas law bans every single gaming activity for all persons and entities in Texas.

10. The *Cabazon Band* Court examined the meaning of the statutory phrase "criminal law," not the term "prohibited," and it considered the term in the context of deciding whether California had authority to enforce criminal laws on tribal lands. This phrase does not appear in the Restoration Act provision at issue, nor does the Act extend the State's

import such a meaning is one congressman's floor comment during final passage of the Restoration Act—Representative Morris Udall expressed his understanding that *Cabazon Band* applied to the amended Restoration Act.[11] Pet., at 15, 24-25.

The Fifth Circuit did not "ignore" the congressman's statement, as petitioners claim, Pet., at 25, but correctly held that a single, twelfth-hour comment by a representative is insufficient to overcome the plain language and otherwise clear intent of the Restoration Act. *See Ysleta I*, 36 F.3d, at 1334. The dangers of allowing such have been well-noted:

> "To permit what we regard as clear statutory language to be materially altered by such [floor] colloquies . . . would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan v. Wald*, 468 U.S. 222, 237 (1984).

See also Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982) ("Contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."). Indeed, the construction urged by petitioners impugns the testimony of Tigua Governor Miguel Pedraza, given at a congressional hearing on the Restoration Act:

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general civil and criminal jurisdiction like Public Law 280.

11. Petitioners point to a change in the language of the bill's gambling prohibition from the 99th to the 100th Congress to contend that Congress codified *Cabazon Band*. Pet., at 23-24. The earlier version provided that "all gaming as defined by the laws and administrative regulations of the State of Texas . . . shall be prohibited." *Ysleta I*, 36 F.3d, at 1329 (quoting 132 CONG. REC. S13634 (daily ed. Sept 25, 1986)). The change in phraseology is not suggestive of a codification of *Cabazon Band*, however, and petitioners rely on the lone floor comment to make their case.

> "[T]he new proposed section 107, . . . which would prohibit, as a matter of federal law, all gambling or bingo on our reservation. We have requested that such a prohibition be included because that accurately states our own tribal custom—we do not now nor have we ever permitted gambling in any form on our reservation. Attached to my statement is our Council's resolution that more fully states our position on this matter." *Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344 Before the Senate Select Comm. on Indian Affairs*, 99th Congress, 2d Sess. 102 (1986) (statement of Miguel Pedraza, Governor, Ysleta del Sur Pueblo).

And this construction would also disavow the tribal resolution, which is specifically referenced in the Restoration Act. *See* 25 U.S.C. §1300g-6(a).

In addition, the relevant committee report contradicts the congressman's floor comment. The Senate Committee of the 100th Congress, which was the source of the amended language of the gaming prohibition, reported that, even with the alteration in the phrasing of the gaming prohibition, "the central purpose" of these two versions, "to ban gaming on the reservations as a matter of federal law," remains unchanged. *Ysleta I*, 36 F.3d, at 1329 (quoting S. REP. NO. 100-90, at 8 (1987)). Instead of addressing the Senate Committee's explanation of the amendment—that it barred gambling on the reservation as a matter of federal law—petitioners rely exclusively on the post-amendment comment of one House member, erroneously suggesting that the Fifth Circuit should have given his floor comment decisive weight over those of the Senate

Committee that formulated the bill's language.[12]

In an effort to excise from the legislative history the tribal resolution pledging not to gamble and requesting that Congress pass the Restoration Act and its gambling prohibition, petitioners contend that in *Ysleta I*, the Fifth Circuit should not have considered legislative history related to the earlier version of the Restoration Act that was not enacted.[13] Petitioners disclaim the resolution's relevance because the resolution was presented in congressional hearings during the 99th Congress, before the language of the gambling prohibition in the bill was amended. The legislative history, however, does not support such a dismissal. The extensive testimony offered on the Restoration Act during the 99th Congress, which included the tribal resolution, was carried over to

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12. In support of their claim, petitioners also inappropriately reference extra-record testimony by congressional staff attorneys offered at a 2002 hearing in the *Alabama-Coushatta* case. Pet., at 24 n.7; *see, supra* note 8. The State lodged objections to that testimony at the hearing as improper. More importantly, petitioners offer no authority for the incredible proposition that a senate staffer's testimony—given more than fifteen years after a bill's passage–should be given any weight in the reading of a statute, let alone weight that overcomes the plain language of the statute and its documented, contemporaneous legislative history. Additionally, this testimony was ultimately unavailing as the federal district court in the *Alabama-Coushatta* case recently ordered the closure of that tribe's casino under the Restoration Act. *See Ala.-Coushatta Tribes of Tex. v. Texas*, __ F.Supp. 2d __, No. 9:01-CV-299, 2002 WL 1369473 (E.D. Tex. June 25, 2002).

13. Petitioners suggest that the district court expressed doubt about the Fifth Circuit's review of the Restoration Act's legislative history in *Ysleta I*, Pet., at 26, but fail to acknowledge that the only doubt was about the need to assess that legislative history, as the language of the statutory prohibition is plain. *See* App., at 60a (noting that the statutory "language used is clear and unambiguous").

the 100th Congress and adopted into the legislative history for the enacted version of the Restoration Act. *See* S. REP. NO. 100-90, at 7-8 (1987). Thus, the tribal resolution attached to the eventual passage of the Restoration Act.[14]

2. Petitioners' interpretation of "prohibited" is not supported by the canons of statutory construction.

Further, petitioners' interpretation of the term "prohibited" is undermined by familiar rules of statutory construction. Their reading assumes that Congress intended the term "prohibited" to mean something counterintuitive and that it chose a meaning that rendered its gambling prohibition meaningless from day one, and the rules of statutory construction do not permit robbing the prohibition of meaning, or allow absurd results. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *United States v. Turkette*, 452 U.S. 576, 580 (1981).[15] The Fifth Circuit was bound to give the statute its plain meaning, "enforce . . . according to its terms," *United States v. Ron Pair Enters., Inc*, 489 U.S. 235, 241 (1989), and construe in its "ordinary, everyday" sense, *Crane v. Commissioner*, 331 U.S. 1, 6 (1947). As a matter of common

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14. Moreover, if changes in draft language are to be considered, it should be noted that Congress *rejected* an earlier proposed provision that would have allowed a means for petitioners to deviate from Texas law, *see Ysleta I*, 36 F.3d, at 1327-28, a resounding confirmation that Congress did not intend anything other than a strict prohibition. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

15. The tribe asserts that the term should have been construed in favor of the tribe, but that canon of statutory construction is utilized only in cases of ambiguity, *e.g., South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), which remains unidentified, and in any event, does not trump other statutory interpretation principles. *See Chickasaw Nation*, 122 S.Ct., at 535-36.

usage, "prohibited" means forbidden, precluded, or illegal. *See, e.g.*, OXFORD ENGLISH DICTIONARY, p. 596 (2d ed. 1989); BLACK'S LAW DICTIONARY, p. 1228 (7th ed. 1999). The meaning of "prohibit" does not vary, only the object of the prohibition. With no dictionary or court decision supporting its proposed meaning, petitioners can hardly accuse the Fifth Circuit of error.

Whether considering the textual command alone, or together with legislative materials, the court of appeals correctly concluded that Congress did not import *Cabazon Band*'s reasoning into the Restoration Act.[16] If *Cabazon Band* supplied the meaning of

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16. In an effort to marginalize the solid conclusions reached by the Fifth Circuit in *Ysleta I*, petitioners cast aspersions on the appeal process in that case. They state that the Fifth Circuit "decided an issue that was never pled, briefed, or argued: that the Restoration Act, and not IGRA, governs gaming on the Pueblo's reservation" and that it "effectively denied [petitioners] [their] day in court[.]" Pet., at 10; *see also id.*, at 9, 15. That is refuted by looking at the briefing in the case, as well as the opinion's recitation of the parties' arguments. *See Ysleta I*, 36 F.3d, at 1331, 1332-35; *see also* Pet., at 9 (explaining that in *Ysleta I* parties raised issue of whether IGRA or Restoration Act governed and that State argued that Restoration Act controlled). Petitioners also complain that the Fifth Circuit considered the legislative history of the Restoration Act in *Ysleta I* without providing petitioners the opportunity to present arguments regarding the Act's legislative process. Pet., at 15. Petitioners do not suggest that the Fifth Circuit somehow rebuffed such briefing, and like all parties, they had ample opportunity to address legislative history in their briefing. Moreover, petitioners admit that they were able to present their version of the legislative history to the district court in this proceeding. Pet., at 15. And although the district court determined it was bound by *Ysleta I*, petitioners also made these same legislative-history arguments both on appeal to the Fifth Circuit panel and later on petition for rehearing en banc, complaining strenuously that *Ysleta I* was incorrectly decided.

"prohibited," then the prohibition would be diluted to prohibit nothing. Congress enacted a real prohibition, as sought by the tribal resolution. Indeed, there is an absence of any indication to adopt *Cabazon Band*, aside from the comment of one member of Congress, and instead consistent signs that Congress intended to put in place a strict gambling prohibition.

> "The report's reference to both the laws and administrative regulations of Texas is clearly inconsistent with a contention that . . . the prohibitory-regulatory distinction of *Cabazon Band* would be involved in analyzing the Restoration Act. . . . Congress provided in §107(a) that '[a]ny violation of the prohibition shall be subject to *the same civil and criminal penalties* that are provided by the laws of the State of Texas.' Again, if Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a *civil* penalty? . . . . Congress was merely acceding to the tribe's request that the tribal resolution be codified." 36 F.3d, at 1333-34; *see also id.* nn.17 & 18.

The Fifth Circuit was entirely consistent with the Court's precedent and there is no sign of error on this issue.

3. *Ysleta I* is not at odds with other circuit court decisions.

Petitioners also point to decisions applying the *Cabazon Band* distinction, Pet., at 22 (citing cases), in an effort to suggest some

type of division among courts.[17] Those decisions predated the *Ysleta I* opinion, and no conflict has developed since that time.

Two of the cited decisions do not represent any division, but simply apply *Cabazon Band* to Public Law 280, the very statute examined in *Cabazon Band*, and thus are inapposite to the issue of extending the decision's analysis beyond Public Law 280. The district court decision cited likewise fails to hint at a conflict because, although it extended *Cabazon Band*'s analysis to the Assimilative Crimes Act, it did so only because, like Public Law 280, the ACA "is purely a jurisdictional statute" that "entitle[s] the states to enforce all their laws on the Indian reservations," and not a statute, like for instance, the Restoration Act, that extends "only certain gambling laws on the Indian reservation," and because "dilut[ing]" the ACA with "the criminal/prohibitory distinction" satisfied the need to "more narrowly construe[]" the ACA's "broad jurisdictional grant." *Pueblo of Santa Ana v. Hodel*, 663 F.Supp. 1300, 1311 n.15 (D. D.C. 1987). Petitioners have not unearthed any division on this point.

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17. Not surprisingly, petitioners fail to acknowledge the many decisions that, *consistent* with *Ysleta I*, have rejected an emasculated definition of "prohibit" or an extension of *Cabazon Band*'s analysis. *See United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 564 (CA8 1998); *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1258 (CA9 1994); *Cheyenne River Sioux Tribe v. S. Dakota*, 3 F.3d 273, 279 (CA8 1993); *see also Mo. River Servs., Inc. v. Omaha Tribe*, 267 F.3d 848, 854 (CA8 2001); *Sault Ste. Marie Tribe v. Engler*, 146 F.3d 367, 372 (CA6 1998); *United States v. Cook*, 922 F.2d 1026, 1035 (CA2 1991); *United States v. Dakota*, 796 F.2d 186, 189 & n.4 (CA6 1986); *United States v. Farris*, 624 F.2d 890, 897 (CA9 1980); *United States v. Dakota*, 666 F.Supp. 989, 998-99 (W.D. Mich. 1985), *aff'd*, 796 F.2d 186 (CA6 1986); *New Mexico v. Johnson*, 904 P.2d 11, 20-21 (N.M.1995); *Citation Bingo, Ltd. v. Otten*, 121 N.M. 205, 207 n.2 (N.M. 1995).

C. The Fifth Circuit's Holdings in *Ysleta I* Regarding the Restoration Act's Gambling Prohibition Were Neither Unconstitutional Nor Dicta.

Petitioners make a disjointed, and frankly somewhat confusing, argument challenging 1994's *Ysleta I* as an "unconstitutional advisory opinion" in its holding regarding the Restoration Act's gaming prohibition. Understanding that *Ysleta I* considered and rejected their arguments, petitioners resort to characterizing that decision as nonbinding precedent. To the extent that they are claiming that the Fifth Circuit's holding in *Ysleta I* was non-binding dicta because the court ultimately decided that the federal courts were barred from hearing the case by the Eleventh Amendment, petitioners are incorrect.

The Fifth Circuit's construction of the gaming prohibition was essential to its resolution of *Ysleta I.* Although the ultimate holding was that the Restoration Act did not waive the State's sovereign immunity and the tribe's suit had to be dismissed, *Ysleta I*, 36 F.3d, at 1336-37, the court of appeals was required to reach a series of preliminary holdings prior to that determination. Among these necessary, sequential holdings were the determination that the criminal-prohibitory/civil-regulatory dichotomy of *Cabazon Band* did not apply to the Restoration Act, the holding that Texas's gambling laws operate as surrogate federal law for petitioners' gambling, and the conclusion that the Restoration Act, and not IGRA, governs petitioners' gambling. *See Ysleta I*, 36 F.3d, at 1332-35. All this was necessary precursor to the Fifth Circuit's decision that the Restoration Act did not waive the State's sovereign immunity.

Such incremental holdings are never considered dicta, but are given the same weight and effect as the ultimate holding in a case. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (contrasting dicta with holdings, which include the final disposition of a case as well as the preceding parts of the opinion "necessary to

that result"); *Fla. Cent. R. R. Co. v. Schutte*, 103 U.S. 118, 143 (1881) (explaining that "[i]t cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of consideration of the case, something else was found in the end which disposed of the whole matter."); *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting) ("the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law"). Thus, the Fifth Circuit's rejection of *Cabazon Band*'s analytical approach and its recognition of the governing force of the Restoration Act over the tribe's gambling activities were in no way dicta as they were necessary to its ultimate sovereign-immunity determination.

Indeed, petitioners implicitly admit as much. They do not contend that the holdings regarding the meaning of the Restoration Act were not necessary to *Ysleta I*'s ultimate holding, but instead seem to suggest, with the assertion that the Fifth Circuit "lacked jurisdiction" over the case, Pet., at 20, that the court's holdings were dicta because the court determined that jurisdiction was lacking in the case and dismissed on Eleventh Amendment grounds. That argument lacks any merit as the court clearly had jurisdiction to decide jurisdictional questions and necessary subsidiary issues. *See generally, e.g., Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 122 S.Ct. 1640 (2002).

III. THE FIFTH CIRCUIT PROPERLY REJECTED THE CHARACTERIZATION OF *YSLETA I* AS DICTA.

Petitioners do not even address the Fifth Circuit's judgment in this case until the end of their petition, and then, as already discussed, they make a plea for error correction. But the error they complain of is unrecognizable. Their sole claim to a reviewable error in this case is that the Fifth Circuit should have recognized that the portions of *Ysleta I* addressing the gambling prohibition and

Cabazon Band were impermissible dicta. Pet., at 26. The Fifth Circuit's careful analysis and holdings in *Ysleta I* simply cannot be regarded as dicta, *see* II.C *supra*, and the court of appeals rightly rejected the argument.

CONCLUSION

For these reasons, the State of Texas respectfully requests that the Court deny the petition for a writ of certiorari.

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